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## UNITED STATES SUPREME COURT.

No. ~~780.~~ 442

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT, PLAINTIFF IN ERROR,

VS.

J. D. TRIBILCOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED JANUARY 13, 1875.

# UNITED STATES SUPREME COURT.

**No. 780.**

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INDEX.


| | Original. | Print. |
|---|---|---|
| Præcipe for summons | 4 | 1 |
| Summons | 6 | 1 |
| Marshal's return of service on summons | 8 | 2 |
| Record entry, (Oct. 6, 1873) | 9 | 3 |
| Amended and substituted petition | 10 | 3 |
| Record entry, (Oct. 18, 1873) | 17 | 7 |
| Cost bond | 18 | 7 |
| Answer | 19 | 8 |
| Record entry, (Oct. 23, 1873) | 20 | 8 |
| Amended answer | 22 | 8 |
| Demurrer to answer | 43 | 14 |
| Record entry, (May 19, 1874) | 47 | 17 |
| Second amended answer | 47a | 17 |
| Replication | 49 | 24 |
| Record entry, (Oct. 20, 1874) | 50 | 24 |
| Record entry, (Oct. 21, 1874) | 51 | 25 |
| Record entry, (Oct. 22, 1874) | 52 | 25 |
| Bill of exceptions | 54 | 26 |
| Incorporation of Great Western Insurance Company | 54 | 26 |
| By-laws of Great Western Insurance Company | 61 | 28 |
| Transcript, J. D. Tribilcock vs. First National Bank of Bloomfield, et al | 90 | 37 |
| Court's instructions to jury | 103 | 41 |
| Writ of error | 133 | 50 |
| Appeal bond | 137 | 51 |
| Original citation | 139 | 51 |
| Clerk's certificate | 140 | 52 |

2 Pleas in the Circuit Court of the United States of America, for the District of Iowa at a term thereof, began and holden at the United States Circuit Court Room in the City of Des Moines, in the State of Iowa and District aforesaid, on the second Monday of October, it being the 12th day of October, A. D. 1874, before the Hon. John F. Dillon, United States Circuit Judge for the Eighth Circuit, and Hon. James M. Love, United States District Judge for said district of Iowa.

3 Be it remembered that, heretofore, to-wit: on the 17th day of July, A. D. 1873, C. W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, Illinois, by his attorneys, Nourse, Kauffman & Holmes, filed in the Clerk's Office of the Circuit Court of the United States for the District of Iowa, his Præcipe for Summons against J. D. Tribilcock; which said Præcipe is in words and figures following, to-wit:

4 United States Circuit Court, District of Iowa.

| | |
|---|---|
| C. W. UPTON, Assignee of the Great Western Insurance Company, of Chicago. Illinois, Bankrupt, a citizen of the State of Illinois, Plaintiff, *vs.* J. D. TRIBILCOCK, a citizen of the State of Iowa, Defendant. | Præcipe for Summons. |

*To the Clerk of said Court:*

You will please issue summons in above entitled cause, directed to said defendant, returnable according to law.

PARTIES—As above.

ACTION—Debt on unpaid instalments of stock subscribed to the capital stock of the said Great Western Insurance Company, in the sum of eight thousand dollars, with interest from August 15, 1872.

[Signed] NOURSE, KAUFFMAN & HOLMES,
Attorneys for Plaintiff.

[Endorsed] Filed July 17, 1874.
GEORGE B. CORKHILL, Clerk.

5 And, thereupon, there was issued from said Clerk's office, a summons against said J. D. Tribilcock, which said summons is in words and figures following, to-wit:

6 *Summons United States Circuit Court.*

UNITED STATES OF AMERICA,
*District of Iowa:*

*To the Marshal of the District of Iowa—*

In the name of the President of the United States, you are hereby commanded to summon J. D. Tribilcock, a citizen of the State of Iowa, to appear before the Honorable Circuit Court of the

United States, in and for the District of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Des Moines, on the second Monday of October next, it being the 13th day of October, A. D. 1873, then and there to answer unto C. W. Upton, Assignee in Bankruptcy of the Great Western Insurance Company, a citizen of the State of Illinois, in a plea of debt upon unpaid instalments of the stock subscribed to the capital stock of said Great Western Insurance Company, to the damage of said Plaintiff in the sum of eight thousand ($8000) dollars, with interest from August 15, 1872.

Hereof fail not, aud have you then and there this writ.

Witness the Honorable Nathan Clifford, Senior Associate Justice of the Supreme Court of the United States, at the city of Des Moines, this the 17th day of July, A. D. 1873, and of the independence of the United States the 98th.

[Signed] GEORGE B. CORKHILL,
*Clerk U. S. Circuit Court, District of Iowa.*

[Seal of the U. S. Circuit Court, District of Iowa.]

7 And afterwards, to-wit: on the 25th day of September, 1873, said summons was returned by the Marshal of said District, and filed in said Clerk's office with his return of service endorsed thereon, which said return is in words and figures following, to-wit:

8 This writ came into my hands for service on the twenty-second day of July, A. D. 1873, and I served the same on the within named J. D. Tribilcock, by reading the same to the said J. D. Tribilcock, and by delivering a true copy to him this 22d day of July, A. D. 1873, at Bloomfield, in the County of Davis and State of Iowa.

[Signed] PETER MELENDY, *U. S. Marshal.*
J. K. PHILO, *Special Deputy.*

*Marshal's Fees.*

| | |
|---|---|
| Mileage ——— miles | $ 7.20 |
| Service on | 2.00 |
| Copy | 1.00 |
| | $10.20 |

[Endorsed] No. 1671. Summons. Circuit Court of the United States, District of Iowa. C. W. Upton, Assignee, &c., *vs.* J. D. Tribilcock.
Filed September 25, 1873.
GEORGE B. CORKHILL, *Clerk.*
NOURSE, KAUFFMAN & HOLMES,
Attorneys for Plaintiff. Residence, Des Moines.

9 Afterwards to-wit: on the 16th day of October, the same being of the October term, 1873 of said Court, there appears in the records of the proceedings thereof in said cause, the following entry-to-wit:

United States Circuit Court, District of Iowa, October Term, 1873.

*Thursday, October 16th, 1873.*

C. W. UPTON, assignee, &c., *vs.* J. D. TRIBILCOCK, } No. 1671, Law.

This cause came on to be heard this day on defendant's motion for a more specific statement of certain matters set out in the petition, and after argument of counsel thereon the court being advised sustains said motion so far as to require plaintiff to state if said subscription is in writing, and if so the date thereof. Thereupon plaintiff takes leave to amend his petition.

10 On the same day, to-wit: October 16, 1873, the said plaintiff, by his said attorneys' filed in said Clerk's Office his amended and substituted petition in said cause, which said petition is in words and figures following, to-wit:

Circuit Court of the United States, District of Iowa.

CLARK W. UPTON, assignee in Bankruptcy of the Great Western Insurance Company, Plaintiff, *vs.* J. D. TRIBILCOCK, Defendant. } Petition at Law.

*To the said Circuit Court of the United States for the District of Iowa:*

The Plaintiff, Clark W. Upton, as assignee in Bankruptcy of the Great Western Insurance Company, claims of the Defendant, J. D. Tribilcock, the sum of eight thousand dollars, as money justly due him from the said Defendant, with interest at the rate of six per cent per annum from and after the 15th day of August, 1872, and for cause of such claim, and for showing as to the jurisdiction of this court in the premises, avers:

That the Great Western Insurance Company is a body corporate heretofore created, and existing under the laws of the State
11 of Illinois, having its principal office and place of business at the City of Chicago, in said State, and as such corporation was, and is a resident and citizen of said State. The Plaintiff, Clark W. Upton, (as assignee in Bankruptcy of said Great Western Insurance Company, as hereinafter more fully set forth) is also a citizen of said State of Illinois, and is a resident of the City of Chicago, in said State.

Plaintiff avers that said Great Western Insurance Company was duly constituted a body corporate by virtue of an act of the legislature of the State of Illinois, entitled an "Act to Incorporate the Great Western Insurance Company of Chicago, Illinois," approved February 4, A. D., 1857, and as such corporation had full power and

authority to make contracts for to its capital stock, and to issue certificates therefor, and that by the terms of said act the capital stock of said Company was fixed at five hundred thousand dollars. The said Company had power under its said charter
11*a* to make contracts of insurance and take risks on all kinds of property, and to charge and receive premiums therefor.

Plaintiff avers that afterwards, to-wit: On the 25th day of June, 1870, said Great Western Insurance Company was re-organized by the stockholders and directors thereof, under the general incorporation acts of the State of Illinois, and its capital stock authorized to be increased to five millions of dollars. That said capital stock was divided into shares of one hundred dollars each, which stock constituted its only fund and means of paying the losses it might meet in the prosecution of its business. That by its charter said corporation was empowered to do any and all acts consistent with the constitution and laws of the State of Illinois.

That by the laws of the State of Illinois in such case made, it was provided that the corporators of any insurance company organized in the State o Illinois should severally be liable for all
12 debts and responsibilities of such company, to the amount of stock by him or them held, until the whole amount of the capital stock of such company shall have been fully paid in, and a certificate thereof recorded.

Plaintiff avers that the defendant, J. D. Tribilcock is a citizen of the State of Iowa, and a resident at Bloomfield in said State, and that the said J. D. Tribilcock heretofore, to-wit: in the year 1870, and subsequent to the reorganization of said company as aforesaid, did verbally agree to become a stockholder in said Great Western Insurance Company to the amount of one hundred shares of the capital stock of said company, of one hundred dollars each, and did accept from said company, with intent to become a stockholder thereof, a certificate of the capital stock of said company for one hundred shares of said stock, and became thereby obligated to pay for the said stock the full amount thereof, as follows: Five per cent of said sum to be paid down, or upon delivery of cer-
12*a* tificates of the stock subscribed for, five per cent in three months from the date thereof, five per cent in six months from the date thereof, and five per cent in nine months from the date thereof, and the balance to-wit: Eighty per cent thereof whenever lawfully called upon therefor, according to the charter of said company, and the laws of the State of Illinois, under which said organization existed.

Plaintiff avers that said Great Western Insurance Company did execute and deliver to said defendant certificates for one hundred shares of its capital stock as aforesaid, and that said defendant has received and accepted the same, and has paid thereon the several instalments, to-wit: Four instalments of five per cent on each share of stock so held, being in the aggregate the sum of two thousand dollars, and no other, further, or different sums. Whereby the said defendant became and ever since has been a stockholder in said Great Western Insurance Company, subject to all the
13 rights, privileges and profits enuring to the stockholders

thereof in proportion to the shares of stock held by him, and in like manner subject to all the burdens and liabilities of the stockholders in said company.

Plaintiff shows that on the faith of said stock so taken by said defendant and other stock of like nature, to the amount of—— hundred thousand dollars, in pursuance of its increase of stock as aforesaid, the said Great Western Insurance Company obtained faith and credit with the public, and was enabled to make contracts for insurance, and to receive large sums for premium upon risks assumed and policies issued. That in pursuance of the requirements of the statute of Illinois, in such cases made and provided the amount so unpaid of defendant's stock, together with the unpaid stock of all and singular the other stock holders in said Great Western Insurance Company were by the officers and agents of said Great Western Insurance Company, reported to the
13*a* Auditor of the State of Illinois, and said company otherwise made public and advertised the same as assets and available resources of said company, upon the faith of which statements so made to the public through said State Department and otherwise, said company obtained public faith and credit, and was enabled to extend its business and procure contracts of insurance, and did receive premiums to a large amount for the use and benefit of its said stockholders.

Plaintiff avers that afterwards, to-wit: On the 3d day of January, A. D., 1872, to-wit: At Chicago, in the State of Illinois, in consequence of great losses which said Insurance Company had prior to that time sustained by fire in said city of Chicago, aforesaid and elsewhere, its entire cash capital and assets were exhausted, and said company became liable to its policy holders to an amount greatly exceeding all its cash funds and means of payment, and in an amount largely in excess of all sums that can be
14 collected on its entire unpaid capital stock and assets, which said liabilities are still outstanding, due, and unpaid, and for the purpose of providing means of payment thereof, the said Insurance Company, by a vote of its directors and stockholders, duly convened for that purpose, to-wit: on the day and year aforesaid, to-wit: at Chicago, in the State of Illinois, aforesaid, duly assessed, called in, and ordered paid, to-wit: twenty per cent of the then remaining unpaid eighty per cent on each share of stock, to-wit: twenty dollars on each share thereof, so held by its stockholders on said unpaid capital stock, of which the said stockholders then and thereafter had notice, and which said sum so assessed, called in and ordered to be paid, is still due and owing from said defendant.

Plaintiff avers that afterwards, in consequence of its losses so sustained as aforesaid, and the delinquencies of its stockholders in the payment of the calls so made upon them as aforesaid, the said Great Western Insurance Company became unable to meet
14*a* its liabilities, and upon a petition filed in bankruptcy on the 17th of January, 1872, by Richard M. Hooley against the said Great Western Insurance Company, the said insurance company was afterwards, to-wit: on the 6th day of February, A. D., 1872,

adjudicated a bankrupt by the District Court of the United States, for the Northern District of Illinois, in pursuance of the act of Congress of the United States in such case made and provided, as by the records thereof now remaining in said court will more fully and at large appear.

Plaintiff avers that on the 11th day of April, A. D. 1872, the said Clark W. Upton, Plaintiff was duly appointed Assignee in Bankruptcy of the estate of the Great Western Insurance Company, in conformity with law, and a deed of assignment of all the estate, effects and property of the said Great Western Insurance Company, bankrupt as aforesaid, was executed in due form of law, under the hand and seal of Homer N. Hibbard, Esq., Register in Bank-
15 ruptcy for the Congressional District of the State of Illinois, and delivered to the said Clark W. Upton, so appointed assignee as aforesaid, thereby vesting in the said assignee the estate, property and effects of the said bankrupt.

Plaintiff avers that the said District Court of the United States, sitting in bankruptcy in and for the Northern District of Illinois, on the application and petition of the said Clark W. Upton, assignee of the estate of said bankrupt as aforesaid, to-wit: on the 5th day of July, A. D. 1872, made and entered of record in said court, a call upon the stockholders of said bankrupt for the full payment of the entire unpaid capital stock of the said bankrupt, severally held by them and each of them, and ordered the same paid as hereinafter set forth, which said call and order of payment was of the following tenor and effect, to-wit:

In the Matter of the
GREAT WESTERN INSURANCE COMPANY } In Bankruptcy.
Bankrupt.

And now, on this day, comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court,
15*a* showing that a large amount of capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proved against the estate of said bankrupt, and upon the investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee, on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof, that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

And the Plaintiff, assignee as aforesaid, avers that notice in accordance with the terms and conditions of said order was
16 duly given to the stockholders of said bankrupt as therein and thereby required.

Plaintiff further avers that personal notice of said order has been heretofore duly given to said defendant, and demand made of pay-

ment of the amount due and ordered to be paid as aforesaid, to-wit: the sum of 80 per cent. of the amount of stock subscribed by said defendant as aforesaid, and the said defendant has wholly refused to pay the said sum or any part thereof.

Wherefore Plaintiff brings this suit and asks judgment against said Defendant for said sum of eight thousand dollars, with interest at six per cent. from the 15th day of August, 1872, and for costs of suit, and Plaintiff asks that summons issue to said defendant according to law.

[Signed] NOURSE, KAUFFMAN & HOLMES,
Attorneys for Plaintiff.

[Endorsed:] Filed October 16, 1873.
GEORGE B. CORKHILL, *Clerk.*

17 Afterwards, to-wit: on the 18th day of October, the same being of the October term, 1873, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to-wit:

United States Circuit Court, District of Iowa, October Term, 1873.

*Saturday, Oct. 18, 1873.*

C. W. UPTON, assignee, etc.,
*vs.*
J. D. TRIBILCOCK. } No. 1671, Law.

This cause came on this day to be heard, and on motion of defendant it is ordered that plaintiff file a bond for costs, as required by the rules of this court.

18 And on the same day, to-wit: October 18, 1873, said plaintiff, by his said attorneys, filed in said clerk's office his bond for costs, in words and figures following, to-wit:

UNITED STATES OF AMERICA, } *ss:*
*District of Iowa,* }

Circuit Court, October Term, A. D. 1873.

UPTON, assignee, etc.,
*vs.*
J. D. TRIBILCOCK. } In.....

I enter myself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by plaintiff, I hereby agree and stipulate that execution may issue against my property for any costs taxed against plaintiff.

Dated this 18 day of Oct., A. D. 1873.

(Sgd.) ELISHA J. PRATT.

[Endorsed:] Filed, Oct. 18, 1873.
GEORGE B. CORKHILL, *Clerk.*

19 Afterwards, to-wit: on the 21st day of October, 1873, said defendant, by his attorneys, Messrs. Trimble & Caruthers, and Messrs. Gatch, Wright & Runnels, filed in said clerk's office his answer, which said answer is in the words and figures following, to-wit:

In the United States Circuit Court, District of Iowa.

CLARK W. UPTON, Assignee in Bankruptcy of the Great Western Insurance Company, Plaintiff.
*vs.*
J. D. TRIBILCOCK, Defendant. | Answer.

Comes now the Defendant above named, and for answer to the petition of Plaintiff denies each and every allegation in the petition set forth.

[Signed] TRIMBLE & CARUTHERS, AND
GATCH, WRIGHT & RUNNELS,
Attorneys for Defendant.

[Endorsed:] Filed October 21, 1873.
GEORGE B. CORKHILL, *Clerk*.

20 Afterwards, to-wit: on the 23d day of October, 1873, the same being of the October term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to-wit:

United States Circuit Court, District of Iowa, October term, 1873.
Thursday, October 23, 1873.

C. W. UPTON, Assignee, &c.,
*vs.*
J. D. TRIBILCOCK. | No. 1671. Law.

This cause came on this day for hearing upon defendant's application for a continuance herein, and the court being advised, orders that said cause be continued, except as to issues which are to be settled during this term, and that defendants have two weeks from this date to file answer to the merits.

21 And afterwards, to-wit: on the 10th day of November, 1873, said defendant, by his said attorneys, filed in said clerk's office his amended answer in said cause, which said amended answer is in the words and figures following, to-wit:

22 In the United States Circuit Court, District of Iowa.

C. W. UPTON, Assignee,
*vs.*
J. D. TRIBILCOCK. | Answer.

The defendant above named, having first obtained leave of the court, amends his answer as follows:

1. Defendant, not intending to waive any of the matters in his original answer set forth, for further and different answer says: That heretofore, to-wit: about the year of Our Lord, 1868, he was a citizen of the county of Davis and State of Iowa, and that J. W. Ellis, and J. B. Glenn, George Duffield, Thomas Davies, William Hill, and others, whom defendant need not name, also citizens as aforesaid, organized an insurance company called the Southern Iowa Insurance Company, with its place of business at Bloomfield,
Iowa; that said organization was a corporation organized
23 under the laws of Iowa, and was an independent body, doing
business for itself, and having complete control of its business in all respects; that all its stockholders, directors, and other officers were citizens of Davis County, well known each to the other, each having confidence in the other and in the integrity and judgment of officers and directors; that said corporation commenced business and continued the same until about the month of July, 1870; that during all said time the entire business of said company had been managed and controlled by said company by its directory and officers, all of whom were well known to defendant, and were believed by him to be honest, capable men; that at the date last mentioned one Thomas J. W. Long (so called)
came to Bloomfield, Iowa, representing himself an agent of
24 the Great Western Insurance Company, of Chicago Illinois,
which, he said, was a very wealthy and prosperous company, having a large amount of capital stock paid up, and centrally located in the great city of Chicago, the grand commercial center of the West. Said Long called on various of the stockholders of the Southern Iowa Insurance Company, and solicited them to subscribe to the capital stock of the Great Western Insurance Company. This they declined to do. Afterwards, and in the month of August, 1870, he proposed to some of said stockholders to have said Southern Iowa Insurance Company merged into a branch company of said Great Western Insurance Company, representing that it would give prestige and and character to it, and increase its business, and representing that the change would not interfere at all with the
25 organization as an independent organization, and that it
would still control its business, its assets, take obligations, and subscriptions, issue stock, etc. Said stockholders, including defendant, believing said representations, were willing to make the change if it did not in any manner render them liable as stockholders in the Great Western Insurance Company, and place their obligations under the control of said last named company. Afterwards, and in the month of August, 1870, said Long represented to defendant that the organization of said branch company had been agreed to by the other stockholders of the said Iowa Southern Insurance Company and had been commenced; and that F. C. Overton was acting agent of the same, and would continne so until an election of officers by said Branch Company.
26 Thereupon said Overton acting as such agent of said Branch
Company proposed to defendant to have this defendant subscribe to the capital stock of said Branch Company.

The defendant believing the representations of said Long that

such a branch company was being organized, and that he could deal with it, and that said Overton was acting for it, and that it would be an independent company, was willing to change his subscription from the old Southern Iowa Insurance Company to the said Branch Company. It was finally agreed that he, defendant, should subscribe $10,000 to said Branch Company, 20 per cent therof, payable in four equal installments, one-fourth when the stock was delivered, one-fourth three months thereafter, one-fourth six months thereafter, and balance nine months thereafter; the other 80 per cent payable only out of the profits of the en-
27 terprise.

This proposition was accepted and said subscription was made on the conditions named: defendant was to have $10,000 of stock *i. e.* a certificate showing on its face that he owned $10,000 of stock in said Branch Company.

Afterwards, and before the delivery of any certificate, this defendant being apprehensive that he might in some way be liable to a greater extent than contemplated by him in making of said subscription, and the said Long being anxious to obtain notes for the said 20 per cent, secured by real estate, it was proposed that if said defendant would give a note for $2,000, secured by mortgage on real estate that the same should be accepted in *full payment of said subscription*, and that the stock received should be "non-assessable." The defendant accepted said proposition, gave his note for $2,000, which he delivered to said Overton as agent of said
28 Branch Company, said note secured by mortgages on real estate.

Said subscription contract was released in consideration of the delivery of said note, and said note was taken, in full payment for the stock hereafter named, to be kept, controlled and owned by said Branch Company. Afterwards, pursuant to said arrangement and agreement a certificate of stock, a copy of which is appended marked "Exhibit A," was delivered to defendant, which said certificate showed on its face, in terms that it was "non-assessable," and which said certificate was delivered to him by said Overton, acting as agent of the Branch Company, and as stock issued by the BranchCompany.

Defendant says that he never received any other or different certificate of stock, nor did he ever become the owner of any stock in any other manner, or of any other character or kind, nor did he in any manner ever subscribe for any other or different stock,
29 nor in any other or different manner than as hereinbefore set forth. He says that he is now advised that the Great Western Insurance Company and its assignee plaintiff, claim that he subscribed to the capital stock of the said last named company.

Defendant avers that he never knowingly or intentionally subscribed to the capital stock of said company, nor received a certificate of stock issued by it, nor became a stockholder in said company, nor did he authorize any agent of said company or other person to enter his name on the books of said company as a stockholder therein, or know that the same was done, nor did he hold himself out as a stockholder therein, nor authorized any person to

do so for him. And he avers that if said stock was issued by said Great Western Insurance Company and deliverad to him, it
30 was done fraudulently, and that he did not become a stockholder bona fidely in said company.

Defendant says that said paper purportiug to be a stock certificate attached as "Exhibit A." purports in terms to be issued by the Great Western Insurance Company, but that it was represented to defendant on receipt thereof, that this was bnt matter of form, the stock in fact being stock in the Branch Company, and that the form of the certificate was made thus for convenience only. And he says that he received said certificate believing such representations, and on the faith of the representations and agreements hereinbefore set forth, and in no other way, and therefore says he is not liable as in petition set forth and claimed.

II.

31 Defendant, not waiving or intending to waive any of the matters heretofore pleaded in defence says, for further answer, that he did subscribe for stock as in the first count of this amended answer set out, and on the condition therein set forth, and that after said subscription contract had been made, and before any certificate of stock had been delivered to defendant, and before any note had been executed by him and delivered to said Overton, it was agreed by and between defendant and said Overton acting as Secretary of the Branch Company hereinbefore spoken of, which it was represented was being organized that this defendant should give his note for $20,000, secured by a mortgage on real estate, and that said note so secured should be received in full payment and discharge of said subscription, and that thereupon a cerficate of non-assessable stock should be issued to defendant by the
32 said Overton acting as aforesaid for the Branch Company.

And defendant avers that he did make, execute and deliver to said F. C. Overton a note for $20000, secured by mortgage on real estate, which said note was received by said Overton in full payment of such stock, and in full discharge of his, defendant's, obligations on said subscription, and that the said note was, pursuant to said agreement, received in full payment by said Overton of the stock herein named, and in discharge of said subscription contract, and said subscription contract was surrendered and released.

And said Overton then delivered to this defendant a certificate, a copy of which is attached, marked "Exhibit A." Defendant says he never made any contract of any kind whatever, other or different from the contract hereinbefore set out, and never received any stock, or evidence of stock, other or different from that as
33 hereinbefore set forth, never purchased or owned, or held any stock other or different; never became a stockholder in the Great Western Insurance Company, never entered his name on the books of said last named company as such stockholder, nor authorized any other person to do so for him; never knew that any person did so; says if any such thing was done, it was without his knowledge or approbation; nor did he ever hold himself out, or authorize or allow any other person to hold him out, as such stock-

holder of the Great Western Insurance Company. He says it was expressly agreed that defendant should never in any event be liable for more than said $20000, and that for the purpose of showing more clearly said agreement, the said note was given, the said subscription contract was released, and the said certificate was
34 made in terms "non-assessable." Defendant says he never agreed to pay any other sum or sums, nor is he in any manner indebted by reason of the premises to the plaintiff, nor liable as in the petition set forth.

III.

Defendant, not waiving or intending to waive the benefits of the matters in this answer hereinbefore made, nor in the original answer, further answering, says: That prior to the 26th day of August, 1870, he had never been a stockholder in the Great Western Insurance Company, nor was he an incorporator of said company, nor had he in any manner whatever been related to said company, nor had any business transactions with the same; and in answer to the charge that at that time he became a stockholder of said company, and agreed to pay therefor the sum of $10,000, and that he
35 did receive a stock certificate in said company, and became a stockholder therein, he says that said Long, heretofore referred to, and F. C. Overton, acting at the suggestion of said Long, did induce this defendant, in the manner and by the means in the first count of this amended answer set out and detailed, to enter into a contract of subscription as in said count explained, and upon the conditions therein set forth; and that afterwards said Long and Overton, acting at the suggestion of Long, did propose to this defendant that if this defendant would execute a note for $20000, secured by mortgage on real estate, and deliver to Overton, as in said count set forth, that the said subscription contract should be released, and that a stock certificate of the kind shown in Exhibit A should be delivered to defendant. That defend-
36 ant did execute and deliver to said Overton such note for $2000, as in said first count set out, and in the manner and conditions therein named, and that said subscription contract was released, and said stock certificate was delivered by said Overton to this defendant, a copy of which is appended, already referred to as Exhibit A.

Defendant says that he never at any time had any other or different business transaction in which the name of the Great Western Insurance Company was used, or with which it was in any way connected. He is advised that plaintiff now claims that said certificate of stock was issued in fact by the Great Western Insurance Company, of Chicago, Illinois, and that defendant is liable as the holder thereof, to plaintiff, as assignee of said company.

Defendant charges that if the stock was issued by said com-
37 pany, that said company last named had no legal power to issue such stock certificate, or to sell any such stock; that the contract of sale of such stock was and is void, as being *ultra vires*, and that the certificate of stock delivered to defendant was and is void; and that the said note was and is without consideration, said certificate being valueless.

Defendant says he never at any time had anything further or other to do with said Great Western Insurance Company than as above set forth, and that he never authorized any person to register him as stockholder of said Insurance Company, or to hold him out as such, and that he never did any act whatever, unless it was the execution and delivery of said note to Overton, and the receipt of said certificate of stock, to indicate that he was a stock-
38 holder, or was in any manner indebted to said Insurance Company, or a subscriber to its capital stock; so he says he is not liable as in petition claimed.

IV.

Defendant further says: that if there were any entries on the books of the Great Western Insurance Company of Chicago, Illinois, showing that he was the holder of any certificates issued by said company, that said books disclosed the facts in substance hereinbefore set forth; that said stock was sold at twenty per cent. of its face, and was fully paid up, and the defendant owed the company nothing whatever; that the stock certificate issued to defendant showed on its face that it was non-assessable, nor was there ever any return made to the Auditor of State showing that defendant was in any manner liable to said company, and that
39 all persons dealing with said company after the 26th day of August, 1870, well knew or might have known by an examination of the proper records that this defendant owed nothing to said company on stock subscriptions or stock.

V.

Defendant further says that when the risks were taken (if ever taken) and policies issued, on which the alleged indebtedness of the company arose the defendant was not a stockholder, and had no interest in or connection with said company, and that said risks were not taken nor policies received by reason of the supposed indebtedness, or liability of defendant to said company as a stockholder.

VI.

Defendant says further: that the pretended indebtedness of said Great Western Insurance Company for the payment of which
40 this defendant is sought to be made liable on his alleged subscription is fictitious and fraudulent. That such pretended indebtedness against the Great Western Insurance Company was established by fraud and collusion between the pretended policy holders and the officers of said company for a fraudulent purpose, and to get money unjustly and wrongfully out of defendant, and was established in a proceeding to which this defendant was in no wise a party, and was established in a court having no jurisdiction over defendant.

[Signed] TRIMBLE & CARUTHERS,
Attorneys for Defendant,
with whom M. H. JONES and GATCH, WRIGHT & RUNNELS.

41 "*Exhibit A.*"

THE GREAT WESTERN INSURANCE COMPANY,
Organized July 20, 1857, under Act of Legislature,
Approved March 4, 1857.

No. Shares.

*Capital Stock $500,000, with Liberty to Increase to $5.000,000.*

This is to certify that J. D. Tribilcock is entitled to one hundred shares in the capital stock of the Great Western Insurance Company, of Chicago, Illinois, of one hundred dollars each, of which twenty per cent. is payable as follows: Five per cent. on receipt of stock certificate; five per cent. in three months from date hereof; five per cent. in six months from date hereof; five per cent. in nine months from date, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate, being subject to the charter, and by-laws of said cor-
42 poration, and laws of the State of Illinois.

Dated at Chicago, this ninth day of August, in the year of Our Lord, one thousand eight hundred and seventy.

[Signed] H. L. STEWART, President.
C. D. HOOKER, Secretary.

[U. S. Revenue Stamp, 25c—Cancelled.]

[Endorsed:] Filed November 10, 1873.
GEORGE B. CORKHILL, *Clerk.*

43 Afterwards, to-wit: on the 6th day of January, 1874, said plaintiff by his said attorneys, filed in said clerk's office, in said cause his demurrer to defendant's answer, which said demurrer is in words and figures following, to-wit:

In the United States Circuit Court, District of Iowa.

CLARK W. UPTON, Assignee in Bankruptcy of the Great Western Insurance Company, Plaintiff,
*vs.*
J. D. TRIBILCOCK.

Demurrer to Answer.

Now comes the plaintiff and demurs to the several counts of the defendant's answer, filed November 10, 1873, for the several causes hereinafter assigned.

I.

To the first count of said answer for the reasons—

*First.* That said count admits that the defendant is a holder of the stock of the Great Western Insurance Company, and that
43*a* only twenty per cent. thereof has ever been paid,

*Second.* The pretended agreement that said stock should

be non-assessable after the payment of twenty per cent. is a fraud upon the creditors of the company, and is of no validity as against the assignee in bankruptcy of the company.

*Third.* The scheme for the organization of a so-called "Branch" of the Great Western Insurance Company, of which "Branch"
44 the defendant was willing to become a stockholder and enjoy the "prestige," "character," and "increase in business" resulting from a merger into a Branch Company of said "Great Western Insurance Company," "a very wealthy and prosperous company having a large amount of capital stock paid up, and centrally located in the great city of Chicago, the grand commercial center of the West," and at the same time enjoy absolute immunity from all liability thereto, and while holding stock purporting on its face to be the stock of the Great Western Insurance Company, is too impotent in its design, transparent in its object, and palpable in its real character, to avail any person of sane mind and common understanding. It is fraudulent in its whole scope and design, or would have been if the defendant had ever entertained a belief that its ostensible object could have been accomplished. The allegations concerning the organization of this Branch constitute no defense to this action, but very clearly show that defendant
44*a* is a stockholder in the Great Western Insurance Company.

*Fourth.* Said count contains no averment of misrepresentation, upon which defendant had a right to rely as against those dealing with the corporate body, or any creditor thereof, or upon which fraud could be predicated, even as against the company itself.

*Fifth.* The alleged misrepresentations are of such a character that if defendant relied upon them, such reliance is attributable to his own folly and ignorance.

*Sixth.* Defendant having recieved and held the stock of the Great Western Insurance Company, was bound to know his liability for the amount of capital represented by said stock, and not actually paid in, and that the same constituted, in law, a fund for the benefit of creditors, and was, in fact, assets of the company.

*Seventh.* The order of the Bankrupt court requiring *the entire capital stock* to be paid in, an adjudication of the liability of all *stockholders* for the entire unpaid stock, and the only question is: who are stockholders?

45 II.

And for causes of demurrer to the second count of said answer, plaintiff assigns each and every cause of demurrer hereinbefore set out and relating to the first count, with the same force and effect as if here now repeated, with the further cause—

That the allegations in said second count of said answer that the defendant did not authorize any agent of said company, or other person, to enter his name on the books of said company as a stockholder therein, or hold himself out as a stockholder therein, or authorize any person to do so for him, are wholly immaterial, because:— *First*, the actual taking of and holding stock was suf-

ficient authority for all these purposes. *Second*, no such matter can avail as a defense as against creditors. *Third*, the defendant, by accepting and holding said stock, became a member of the corporate body, and creditors, as between themselves and stockholders, are not chargeable with knowledge of what the books of the
45*a* company show, nor of the manner in which they are kept. The stockholder has access to the books of the company, while the creditors have not.

III.

And for causes of demurrer to the third count of defendant's answer, plaintiff reassigns as to this count each and every cause assigned as to the first and second counts, and in respect to the averment in said third count contained, of want of power to issue said stock, plaintiff assigns for additional causes of demurrer—

*First.* That defendant having accepted and held said stock is estopped to deny the power of said company to issue the same as against the creditors thereof.

*Second.* That if the corporation was in fact issuing stock, and at the same time issuing policies of insurance, and dealing with the public on the faith and credit of said issue of stock, the hold-
46 ers of said stock are estopped to deny its power to issue the stock.

*Third.* Said averment is simply a conclusion of law, and no facts are plead upon which such a conclusion could be based.

IV.

And for causes of demurrer to the fourth count of said answer, plaintiff says:

*First.* That said count admits that defendant is a stockholder in said company, and it is immaterial how his stock was registered upon the books of the company.

*Second.* Creditors are not bound to know what the books show, and are not bound by what appears upon them.

*Third.* If said books did disclose said arrangement that the stock should be non-assessable, it is immaterial for the reason that said arrangement was of no validity, for the reasons hereinbefore assigned.

46*a* V.

And for cause of demurrer to the fifth count plaintiff shows that said count admits that defendant is a stockholder, in fact in said company, and states no facts avoiding liability thereon.

VI.

And for causes of demurrer to the sixth count plaintiff shows that the facts therein set out constitute no defense to this action. That this court cannot review the action of the bankrupt court upon the matter of the indebtedness of said company, or in ordering unpaid stock to be paid in, but defendant is bound by that pro-

ceeding, and if erroneous, can only correct it by application to that court.

[Signed.] NOURSE, KAUFFMAN & HOLMES.
Attorneys for Plaintiff.

[Endorsed :] Filed January 6, 1874.
GEORGE B. CORKHILL, *Clerk.*

47 Afterwards, to-wit : on the 19th day of May, the same being of the May term, 1874, of said court, there appears in the records of the proceedings thereof in said cause, the following entry, to-wit :

United States Circuit Court, District of Iowa, May Term, 1874.

*Tuesday, May 19, 1874.*

C. W. UPTON, assignee, etc.,
*vs.*
J. D. TRIBILCOCK. } No. 1671. Law.

This cause came on this day to be heard upon plaintiff's demurrer to defendant's answer ; the court, after argument of counsel thereon, being fully advised, sustains said demurrer.

47*a* Afterwards, to-wit : on the 22d day of May, 1874, said defendant, by his said attorneys, filed in the said clerk's office his amended answer in said cause, which said amended answer is in words and figures following, to-wit :

In the United States Circuit Court, District of Iowa.

C. W. UPTON, assignee,
*vs.*
J. D. TRIBILCOCK. } Answer.

The defendant above named, having first obtained leave of the court, amends his answers heretofore filed as follows :

1. Defendant, not intending to waive any of the matters in his original and amended answers set forth, for further and different answer says :

That heretofore, to-wit : about the year of our Lord, 1868, he was a citizen of the county of Davis, and State of Iowa, and that defendant, J. W. Ellis and J. B. Glenn, George Duffield, Thomas Davies, William Hill, and others whom defendant need not
47*b* name, also citizens as aforesaid, organized an insurance company, called the Southern Iowa Insurance Company, with its place of business at Bloomfield, Iowa. That said organization was a corporation organized under the laws of Iowa, and was an independent body, doing business for itself, and having complete control of its business in all respects ; that all its stockholders, directors and other officers were citizens of Davis county, well known each to the other, each having confidence in the other, and in the integrity and

judgment of officers and directors; that said corporation commenced business and continued the same until about the month of July, 1870; that during all said time the entire business of said company had been managed and controlled by said company, by its directory and officers, all of whom were well known to defendant, and were believed by him to be honest, capable men; that
47*c* at the date last mentioned one Thomas J. W. Long (so-called) came to Bloomfield, Iowa, representing himself as an agent of the Great Western Insurance Company, of Chicago, Illinois, which he said was a very wealthy and prosperous company, having a large amount of capital stock paid up, and centrally located in the great city of Chicago, the grand commercial center of the west. Said Long called on various of the stockholders of the Southern Iowa Insurance Company, and solicited them to subscribe to the capital stock of the Great Western Insurance Company. This they declined to do. Afterwards, and in the month of August, 1870, he proposed to some of said stockholders to have said Southern Iowa Insurance Company merged into a branch company of said Great Western Insurance Company, representing that it would give preslige and character to it, and increase its business, and representing that the change would not interfer at all with the organiza-
47*c* tion as an independent organization, and that it would still control its business, its assets, take obligations and stock subscriptions, issue stock, etc.

Said stockholders, including defendant, believing said representations, were willing to make the change if it did not in any manner render them liable as stockholders in the Great Western Insurance Company, and place their obligations under the control of said last named company.

Afterwards, and in the month of August, 1870, said Long, represented to defendant that the organization of said Branch Company, had been agreed to by the other stockholders of the said Iowa Southern Insurance Company, and had been commenced; and that F. C. Overton was acting agent of the same, and would continue so until an election of officers by said Branch Company.

Thereupon said Overton, pretending to act as agent and Secretary of said pretended Branch Company, proposed to de-
47*d* fendant to have him, defendant, subscribe to the capital stock of said Branch Company, then being organized. The defendant, believing the said representations of said Long, that said Branch Company, was being organized, and that he could deal with it, and that said Overton was acting for it, and that it would be an independent company, and that all its affairs, and his rights, obligations and liabilities, as a subscriber to its capital, would be controlled by it, and subject to the laws of this State, was willing to subscribe to its capital stock, or transfer his subscription from said Iowa Southern Insurance Company, to such pretended Branch Company, and sign a subscription contract for 100 shares—$100 per share—on conditions therein named, among which was that only 20 per cent. should ever be paid by him, and that the balance should be payable only out of profits of the enterprise, and in no other
47*e* way.

This subscription contract was to be held, and not delivered as a binding contract, till all the members of the old Iowa Southern Insurance Company, had agreed to transfer their stock in the like manner, and until the certificates of shares of stock were ready for delivery and were delivered, and then said subscription contract was to be delivered to said Branch Company. It was also represented to defendant, that this defendant would not in any manner or in any event be liable for any amount greater than the said 20 per cent. Defendant says that he was a resident and citizen of Bloomfield, Iowa, and had been for many years, and was not in any manner acquainted with the laws of Illinois, or the charter of the Great Western Insurance Company, of Chicago, Illinois, nor its manner of doing business, nor its powers or the rights and
47*g* liabilities of its share holders, and believed fully the said representations made to him by said Long and said Overton. He says, however, that after considering the matter, and out of what he supposed to be abundant caution, fearing that possibly he might in some manner be liable on said subscription contract for said 80 per cent., he, before the delivery thereof, according to its terms and the conditions upon which it was signed, objected to its delivery in the shape it had been signed, and the said Long being anxious, as it now seems, to obtain a note for the 20 per cent secured by mortgages on real estate, then and there proposed to surrender and release any claim on said subscription contract, and to change the terms of negotiations and stipulations then going on, and to accept a note for $2,000, secured by mortgage on real estate, and to deliver a certificate showing that he, defendant, was the owner of $10,000 of the stock in said Great Western Insur-
47*h* ance Company, and to treat said note as a full payment for said stock, and then and there reported to said defendant that the Great Western Insurance Company had the right and power to make such contracts and arrangements, and had authorized him to do so, and that as a guaranty thereof said subscription contract should be abandoned, released and given up to defendant, and that said certificate of stock should show on its face that it was non-assessable, and that said note and all money, property, papers, obligations and other things of nature pertaining to defendant's interests, and to said Branch Company, should be left under the control of said pretended Branch, and that the Great Western Insurance Company was to have no control over the same, and that there was no possible liability on defendant for said 80 per cent. Defendant says that relying on the said representations and statements he did execute his promisory note, payable, in terms, to the Great Western Insurance Company, of Chicago, Illinois, and secured the
47*i* same by mortgage on real estate in Davis County, Iowa, and delivered the same to said Overton, as the pretended agent of the Branch Company, and that said Overton, thereupon delivered to him a certificate, a copy of which is appended to the amended answer of November 10, 1873, designated "Exhibit A." And that thereupon, and pursuant to agreement, said subscription contract was surrendered and delivered up to defendant. Defendant says that when he delivered said note it was expressly stated

by said Long and said Overton, that said note was a full payment and discharge of all obligations and personal liabilities of all kinds whatsoever of defendant by reason of his contract so made, and his relations created by the delivery to him of said certificate and said note was received in full payment. He now charges that all said statements were made by Long at the instance and by
47*j* the connivance and procurement of said Great Western Insurance Company; that they were utterly false, and known to be false, and were fraudulently made and made to deceive defendant; that they did deceive and mislead him. He says that among other false statements made by said Long and said Overton, speaking at the instance of said Long and said insurance company, it was represented that said note should be left with the said Branch Company, to be held and controlled by it, and that said note was never to be paid except in case of loss by fire, and that then it might be assessed by said Branch Company, and by its directory, as far as necessary to meet such losses, and that it should not be payable on any other conditions nor on the happening of any other event, and as a guarranty that it should be so treated, it was to be left and controlled by said Branch Company, composed of
47*k* defendant and other parties who were known to him—his friends and neighbors. Defendant says that some time after the delivery of said note—say in February, 1871—he ascertained that his said note had not been left in Bloomfield with said pretended Branch Company, but had been sent to Chicago, Illinois.

That thereupon defendant at once went to said Overton, to whom he delivered said note, and from whom he received said certificate, and charged that such fraud had been perpetrated, and demanded his note, and offered to surrender the said certificate—said Overton being the agent still and acting in the same capacity as he had been acting on receipt of said note and delivery of said certificate—but that said Overton declined to surrender said note or receive said certificate. Defendant charges now that said Overton was then acting as general agent of the said Great Western Insurance Company at that time. Defendant also says he immediately afterward, to-wit: in February, 1871, went, himself, and
47*l* also sent agents to Chicago with authority to demand a recision of said contract, and to receive back said note and deliver up said certificate, and that said agents, F. C. Overton and John B. Glenn, did demand said note and did offer to return said certificate, and did demand a recision of said contract of said company, and of H. L. Stewart, President, and C. D. Hooker, Secretary of said company, and that they each refused to take any action whatever.

That he at that time made diligent inquiries respecting the transaction, and his liability thereon, and could learn nothing further, and that he had said agents to make such inquiries of Mr. Stewart and Hooker and others connected with said insurance company. Also of Mr. Overton, and made other inquiries of his legal advisers and other parties whom he supposed ought to know, and that he was advised that he was in no manner liable except on said
47*m* note, and that under the circumstances he would not be lia-

ble on said note unless it got into the hands of an innocent holder. That said Stewart, Hooker and Overton asssured himself, and said Overton and Glenn that he was in no manner liable for any more than the amount of said note in any event, and that he believed said statements, and that he never knew or was advised by any person, nor could in any manner learn that he was liable, or suspected as being liable to pay to said company, or to its creditors any more than the amount of said note, nor that said company, or its creditors, or the representatives of said creditors claimed, or intended to claim any more than the amount of said note, or to claim the 80 per cent. now sued for, till after said company went into bankruptcy, and until he was advised of the same by a demand made on him by the agent of plaintiff, just before the com-
47*n* mencement of this suit, and after the said company had been thrown into bankruptcy and plaintiff had been appointed assignee; so defendant charges that the said representations of said Long and Overton were false and fraudulent, and were made to defraud and deceive defendant, and did mislead and deceive him, and that the said Great Western Company was known to said fraud and was a party to it.

That said company conceived and put said fraud into operation, and was and is a party to the same, and advised said Long to perpetrate the same, and that defendant did not know of the said fraud respecting his liability for the 80 per cent. until after the said insurance company was thrown into bankruptcy, and when it was too late for him to procure. or attempt to procure, a recision of said contract, and a surrender of said certificate on account of said last named fraud. So he says he is not liable.

Defendant says that he never received any other or different certificate of stock, nor did he ever become the owner of any
47*o* stock in any other manner, or of any other character or kind, nor did he in any manner ever subscribe for any other or different stock, nor in any other or different manner than as hereinbefore set forth. He says that he is now advised that the Great Western Insurance Company and its assignee, plaintiff, claim that he subscribed to the capital stock of the said last named company.

Defendant avers that he never knowingly or intentionally subscribed to the capital stock of said company, nor received a certificate of stock issued by it, nor became a stockholder in said company, nor did he authorize any agent of said company or other person to enter his name on the books of said company as a stockholder therein, or know that the same was done, nor did he hold himself out as a stockholder therein, nor authorize any person to do so for him. And he avers that if said stock was issued by
47*p* said Great Western Insurance Company, and delivered to him, it was done fraudulently, and that he did not become a stockholder bonafidely of said company.

Defendant says that said paper purporting to be a stock certificate attached as "Exhibit A" purports in terms to be issued by the Great Western Insurance Company, but that it was represented to defendant on receipt thereof, that this was but matter of form, the stock in fact, being stock in the Branch Company, and that the form

of the certificate was made thus for convenience only, and he says that he received said certificate, believing such representations, and on the faith of the representations and agreements hereinbefore set forth, and in no other way, and therefore says he is not liable as in the the petition set forth, and claimed.

II.

Defendant, not waiving or intending to waive any of the matters heretofore pleaded in defense, says for further answer, that he did subscribe for stock as in the first count of this amended answer
47q set out, and on the condition therein set forth, and that after said subscription contract had been made, and before any certificate of stock had been delivered to defendant, and before any note had been executed by him, and delivered to said Overton, it was agreed by and between defendant and said Overton acting as Secretary of the Branch Company, hereinbefore spoken of, which it was represented was being organized, that this defendant should give his note for $2000, secured by a mortgage on real estate, and that said note so secured should be received in full payment, and discharge of said subscription, and that thereupon a certificate of non-assessable stock should be issued to defendant, by the said Overton, acting as aforesaid for the Branch Company.

And defendant avers that he did make and execute and deliver to said F. C. Overton a note for $2,000, secured by mortgage on real estate, which said note was received by said Overton in full payment of said stock, and in full discharge of his, defendant's
47r obligations on said subscription, and that the said note was pursuant to said agreement, received in full payment by said Overton of the stock herein named, and in discharge of said subscription contract, and said subscription contract was surrendered and released.

And said Overton then delivered to this defendant a certificate, a copy of which is attached, marked "Exhibit A." Defendant says he never made any contract of any kind whatever, other or different from the contract hereinbefore set out, and never received any stock or evidence of stock other or different from that hereinbefore set forth, never purchased or owned, or held any stock other or different, never became a stockholder in the Great Western Insurance Company, never entered his names on the books of said named company as such stockholder, nor authorized any other person to do so for him; never knew that any person did so, says if
47s any such thing was done, it was without his knowledge or approbation; nor did he ever hold himself out, or authorize or allow any other person to hold him out as such stockholder of the Great Western Insurance Company.

He says it was expressly agreed that defendant should never, in any event, be liable for more than said $2,000, and that for the purpose of showing more clearly said agreement, the said note was given, the said subscription contract was released, and the said certificate was made in terms "non-assessable." Defendant says he never agreed to pay any other sum or sums, nor is he in any man-

ner indebted by reason of the premises to the plaintiff, nor liable as in the petition set forth.

He says further that the statute of Illinois—Gross' Statutes—chapter 53, under which said insurance company was organized, did not, nor did the charter or by-laws of said company, or any
47*t* other statute, law, or regulation of Illinois require or provide for a list or register of stockholders of said company or any similar company to be kept in the office of the company, or at any other place in the State of Illinois; but said statute did provide that a report of the financial standing and condition of the company when organized, and annually thereafter, should be made to the Auditor of State of the State of Illinois, and should be subject to public inspection, and as a source of public information: but while it required the amount of capital stock paid in to be reported, as well as the disposition of said capital, it nowhere required the names or place of residence of stockholders, or the amount of stock held by each of the same to be shown, and defendant says that said company never did report that this defendant owed said company any amount for said certificate so delivered to him, nor in any way held out to the public that he was a stockholder for 10,000
47*u* dollars, or in amount exceeding $2000, or that defendant owed the eighty per cent. sued for, or any other less per cent. thereon.

So he says that he does not owe the said company nor its assignee directly, or it creditors indirectly, any part of the amount sued for.

III.

Defendant for further and amended answer says:

That true it is he did subscribe for stock in the manner and on terms and conditions as in the first count of amended answer herein set forth, but he says he did not agree and contract to pay $10,000, but by the express terms of his contract he agreed to pay $2000 only, and to pay the same in the manner and on the terms and conditions in said first count herein set forth, and not otherwise, and he says that if such act of subscription so as aforesaid made, on conditions aforesaid, makes him liable for any amount greater
47*v* than the amount already paid as in said count set forth, that such liability is created by statute and not by any contract of this defendant, and that such liability is a penal liability created by statute of Illinois, and not a liability growing out of contract, and that said liability can only be enforced in the local jurisdiction of the State of Illinois and in the courts within said local jurisdiction, and not in the State of Iowa. Herein he says he is not liable in this suit as claimed by petitioner.

IV.

And for further amended answer defendant says that true it is he did subscribe for stock as in the first count of this amended an-

swer set forth, and in the manner and on the conditions and under the circumstances in said count detailed, but he says he is not liable for any part of the sum in petition claimed, because when he agreed to take said stock he subscribed only $2,000; that he agreed
47w only to pay $2,000 and no more, and that this agreement was express and well understood as to the amount so agreed to be paid, and that he is not liable for any other or greater sum. That he is not liable by the terms of his contract, and that the statute under which said Great Western Insurance Company was organized provides that each corporator shall be generally liable for the amount by him subscribed to the capital of the company, and no more, and does not make him liable as a *stockholder* for an amount equal to the whole or to any given part of the stock at par value, or any other value by him held, and defendant says he never subscribed to the capital stock a greater amount than $2,000, and that such amount was paid. Hence he says he is not liable for any portion of the amount now sued for, the same being no part of said 2,000 dollars subscribed.

He therefore asks a judgment for costs.

TRIMBLE & CARRUTHERS,
GATCH, WRIGHT & RUNNELS,
*and* M. H. JONES,
*for Defendant.*

[Endorsed:] Filed May 22, 1874.
GEORGE B. CORKHILL, *Clerk.*

48 Afterwards, to-wit: on the 27th day of May, 1874. said plaintiff, by his attorneys, Messrs. Nourse & Kauffman, filed in said clerk's office, in said cause, his Replication, which said Replication is in the words and figures following, to-wit:

49 In the United States Circuit Court, District of Iowa.

C. W. UPTON, assignee,
*vs.*
J. D. TRIBILCOCK. } Replication.

Now comes the plaintiff, and expressly reserving to himself all advantage of exception to the amended answer of defendant on file herein for its insufficiency in law as a defense to this action, and reserving the question as to the sufficiency thereof, and each and every count thereof, for the trial hereof, for replication to said amended answer, denies each and every allegation thereof, and of each and every count thereof, as fully as if the same were herein specifically denied.

(Sgd.) NOURSE & KAUFFMAN,
Attorneys for Plaintiff.

[Endorsed:] Filed May 27, 1874.
GEORGE B. CORKHILL, *Clerk.*

50 And afterwards, to-wit: on the 20th day of October, the same being of the Octobor term, 1874, of said court, there

appears in the records of the proceedings thereof in said cause, the following entry, to-wit :

United States Circuit Court, District of Iowa, October Term, 1874.

*Tuesday, Oct. 20, 1874.*

C. W. UPTON, assignee of the Great Western Ins. Co.,
*vs.*
J. D. TRIBILCOCK. } No. 1671. Law.

This cause came on this day for hearing; plaintiff appears by Nourse & Kauffman, and defendant by Trimble, and Gatch, Wright & Runnels, and M. H. Jones; and then came a jury of twelve good and lawful men, to-wit: W. H. Weddington, Thos. Capein, Edward Colton, H. D. Nightingale, B. R. Begin, J. P. Jones, E. H. Bailey, P. P. Bresee, John W. Dickinson, U. Raplee, V. H. Sullivan, Francis Choate, who were duly empannelled and sworn to well and truly try the issues and a true verdict render, according to the law and the evidence given them in court, and they having heard statement of case from counsel were excused until 9 o'clock to-morrow morning.

51 And afterwards, to-wit: on the 21st day of October, the same being of the October term, 1874, of said court, there appers in the records of the proceedings thereof in said cause the following entry, to-wit :

United States Circuit Court, District of Iowa, October Term, 1874.

*Wednesday, October 21, 1874.*

C. W. UPTON, Assignee, &c.,
*vs.*
J. D. TRIBILCOCK. } No. 1671—Law.

This cause came on this day for further hearing; parties appear by their attorneys, and the jury came the same as yesterday, and they having heard a portion of the evidence were excused until nine o'clock to-morrow morning.

52 And afterwards, to-wit: on the 22d day of October, the same being of the October term, 1874, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to-wit :

United States Circuit Court, District of Iowa, October Term, 1874.

*Thursday, October 22, 1874.*

C. W. UPTON, assignee, of the Great Western Insurance Company.
*vs.*
J. D. TRIBILCOCK. } No. 1671, Law.

This cause came on this day for further hearing, the parties ap-

pear by their attorneys, and the jury came the same as yesterday, and they having heard the conclusion of the evidence, argument of counsel, and charge of the court, retired to a private room under charge of a sworn officer to consider their verdict, and after sometime spent in deliberation thereon, returned into open court the following verdict, "to-wit:" We, the jury, find for the defendant in the above entitled cause," F. CHOATE, foreman.

Thereupon it is ordered and adjudged that the plaintiff take nothing in his suit, and that defendant go hence without day, and recover his costs, taxed at $——, and that execution issue therefor.

53 Afterwards, to-wit: on the 31st day of October, said plaintiff, by his said attorneys filed in said Clerk's office in said cause, his bill of Exceptions, which said Bill of Exceptions is in words and figures following, to-wit:

54 C. W. UPTON, assignee of the Great Western Insurance Company, *vs.* J. D. TRIBILCOCK. | In the United States Circuit Court, District of Iowa.

Be it remembered that on the trial of this cause the plaintiff offered evidence of the incorporation of the Great Western Insurance Company by special act of incorporation by the State of Illinois, as follows:

*Charter.*

AN ACT to Incorporate the Great Western Insurance Company, Chicago, Illinois.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That William W. Danenhower, Jacob Russell, Thomas Hale, George Ely, Robert H. Foss, and their successors and associates, be, and are hereby created a body corporate and politic, under the name and style of the
55 Great Western Insurance Company, situated at Chicago, and by that name shall have and enjoy all the rights and privileges and immunities that other like corporations have, and be recognized in all courts of justice and equity in this State.

SEC. 2. When the said party and their associates shall have subscribed one hundred thousand dollars, paying in, as a company fund, five per cent. on the amount subscribed, and securing the balance to be paid on demand or otherwise, by approved judgment notes, by hypothecated stock, mortgages on real estate in Cook county, or other satisfactory security, and shall have chosen nine directors, and those directors shall have chosen one of their number president, and appointed a secretary and treasurer, it shall be deemed fully organized, and enjoy the power herein conferred.

56 SEC. 3. The said company shall have power to make insurance and take risks on all kinds of property, both marine and fire, and charge and receive such premiums as may be agreed

by and between the parties, either upon the mutual, or stock principal, or both.

SEC. 4. The company shall have power to use, invest, or loan its surplus funds, in or on stocks, bottomry, and respondentia, in bonds, mortgages, or personal security, at such rates as private persons may legally do by the laws of this State, and may increase its capital to five hundred thousand dollars.

SEC. 5. The said company may establish agencies and do all acts not inconsistent with the constitution, the laws of this State, or the United States, necessary to, and for the full use and
57 enjoyment, and to carry out the full objects of this Act.

SEC. 6, This act shall be deemed a private act, and be liberally construed for the purposes therein contained, and take effect from and after its passage.

Approved February 4, 1857.

That plaintiff offered in evidence the public statute of the State of Illinois, being chapter 53, on Insurance, Gross' Statute of Illinois, commencing on page 352.

Plaintiff gave in evidence certified copy of proceedings of the company, increasing its capital stock, under said general statute, to $5,000,000,

Plaintiff gave in evidence a certified copy of a report of the Great Western Insurance Company to the Auditor of the State of Illinois, made on the 31st of December, 1870, showing, among other things, the following statement:
58

*Capital.*

| | |
|---|---|
| The amount of capital stock of the company now outstandidg (par value of shares, $100 each) is | $1,188,000 00 |
| The amount of paid up capital stock of the company | 222,831 42 |
| Amount of unpaid subscribed capital for which the subscribers or holders are liable | 965,168 58 |

Plaintiff gave evidence tending to show that the stock subscribed by defendant was computed and counted in making up the amount of capital stock subscribed, and that the 80 per cent of the stock of defendant was computed in the amount of capital stock unpaid shown in said report, but no list or register of subscribers to the stock of the company, or the stockholders thereon, or of their names, was made and reported to the Auditor, or was on file in his office, or embraced in said report. Plaintiff offered ~~to~~ evidence cer-
tificate of the Auditor of State of Illinois of January 1st,
59 1871, authorizing said Great Western Insurance Company to continue to do business. Plaintiff then offered evidence showing bankruptcy of the company, appointment of assignee, deed to the assignee, assessment by the bankrupt court, notice of the same to defendant, and demand of the 80 per cent., as alleged in the plaintiff's petition. Plaintiff gave evidence tending to show that in Aug., 1870, defendant, a citizen of Bloomfield, in Iowa, became a stockholder of the Great Western Insurance Company, and took 100 shares of stock, and received a certificate of stock in form as set

out in the defendant's amended answer, and gave evidence tending to show that he retained said certificate in his possession until the commencement of this suit.

The original certificate was produced on the trial, by defendant, in pursuance of a notice so to produce it, and was offered
60 in evidence.

Plaintiff then introduced on the trial the secretary of the company during the years 1870 and 1871, and proved that the great Chicago fire occurred about the 8th of October, 1871, and offered to show by said secretary the amount and character of the insurance business done by said company during said years and prior to the fire, to which evidence defendant objected, as immaterial, and the court sustained the objection and excluded the evidence as immaterial, to which ruling plaintiff excepted at the time, and his exception so taken is here certified and made a part of the record.

Plaintiff also offered evidence tending to show that at the time the stock certificate was issued to defendant his name was entered upon the stock book of the company, with his residence and
61 amount of stock, and that the company kept such a record in their office of the stockholders and amount of stock subscribed, and that said book was destroyed by fire, in the great fire of October, 1871.

The by-laws of the company were also introduced in evidence, as follows :

*By-Laws.*

*Whereas*, by an act of the General Assembly of the State of Illinois, approved Feb. 4th, A. D. 1857, the Great Western Insurance Company was chartered and authorized to make and establish, and put into execution such By-Laws, Ordinances, and Resolutions as might seem necessary or convenient for the regulation, government and management of its affairs, the same not being at
62 variance with the laws of this State or the United States ; therefore, Resolved, that we hereby adopt the following By-Laws for our government in transacting the business of this company, hereby repealing all former By-Laws heretofore adopted by this company.

SECTION I.

The annual meeting of stockholders for the election of directors, and other business, shall be held in Chicago, Illinois, on the first Wednesday after the first day of January of each year.

SECTION II.

The number of directors shall be regulated by the amount of stock, on the basis of one director for every ten thousand dollars of stock.

SECTION III.

The directors shall hold regular annual meetings on the first

Wednesday after the first day of January in each year, for the election of officers, and other business. At each meeting a
63 majority of the directors shall constitute a quorum for the transaction of business.

SECTION IV.

The directors shall also hold regular quarterly meetings on the first Wednesday after the first day of January, April, July, and October, to receive the reports of officers and committees, and for transaction of other business. Special meetings of the board shall, however, be called by the president and secretary, or by the written request of five members thereof.

SECTION V.

The board of directors shall elect, by ballot, a president, vice-president, secretary and treasurer, and an executive committee, consisting of the president and six other directors, who shall hold their respective offices for one year, or until their successors are elected.

SECTION VI.

64 The compensation of the officers shall be fixed from time to time by the Directors.

SECTION VII.

It may be lawful for the President, with the advice and consent of the Executive Committee to appoint assistant secretaries whose duties shall be specified.

SECTION VIII.

At the election of directors each stockholder shall be entitled to one vote for each share of stock standing in his name, or he may vote by proxy. All proxies shall be in the following form :

*Proxy Vote.*

I hereby appoint ———— as my proxy, to cast my vote upon all questions which may come before any meeting of the stockholders of the Great Western Insurance Company until further notice.

SECTION IX.

65 The President shall preside at all meetings of the Board. He shall sign all stock certificates, policies of insurance and legal contracts entered into by the company ; and may give a casting vote upon all questions or resolutions before the board. He shall sign all checks or drafts upon the treasurer for payment of all debts or claims against the company, or for any other purpose when properly audited. In the absence of the President the duty of his office shall devolve on and be performed by the Vice President.

SECTION X.

It shall be the duty of the secretary to keep all the books of the company in a systematic and correct manner, and at all times open for inspection of the stockholders, and keep all documents and papers properly filed and secured.

66 In addition to which, the special duties of the secretary shall be to manage the Fire Insurance business of the branches and agencies of the company. He shall prepare and countersign all stock certificates, policies of insurance, records and contracts executed or entered into by this company. He shall receive all monies belonging to this company and pay the same over to the treasurer, daily, taking his receipt therefor. He shall countersign all drafts and checks upon the treasurer for the payment of audited claims. He shall conduct the correspondence of the company, shall examine and decide upon applications of insurance, and in the adjustment of losses. He shall have a general supervision of the agents of the company, with full power to employ and discharge the same, and shall make a quarterly report and
67 annual report of his doings to the Board. The duties of the secretary to be under the supervision of the Executive Committee.

SECTION XI.

It shall be the duty of the treasurer to keep an accurate account of all money coming into his hands, and pay the same on the draft or check of the President, countersigned by the secretary, making a quarterly report to the directors. The treasurer shall give bonds to the company for the faithful performance of his duty in such amount as may from time to time be required by the directors. The treasurer shall loan no funds of the company without the sanction of the Executive Committee.

SECTION XII.

The duties of the Executive Committee shall consist in auditing accounts and claims, and they shall have general supervision
68 and management of the affairs of the company and supervise the accepting of applications for insurance, and the placing of stock, and extending the business of the company under the supervision of the directors. Four members of said committee shall constitute a quorum for the transaction of business.

SECTION XIII.

In the event of death, resignation or removal of any officer of the company, the Executive Committee may appoint a successor to hold office until the next meeting of the directors, when such vacancy shall be filled by the directors. The directors may remove any officer of the company at any regular meeting or any special meeting called for that purpose, provided thirteen directors vote for such removal.

SECTION XIV.

69 No officer or agent shall contract any debts, or in any way make the company liable to pay any sum, or sums of money, or other valuable thing or things, exceeding the sum of fifty dollars, without first having obtained the consent of the executive committee.

SECTION XV.

The agents of this company shall not be removed except by the executive committee. The secretary may, however, suspend any agent pending such action of the executive committee.

SECTION XVI.

The officers shall make full statement as to the condition of the company annually to the regular meeting of the stockholders, and quarterly to the directors. The quarterly reports to be printed in circular form, and sent to each local board for distribution.

SECTION XVII.

70 From the profits of the business, or income, cash dividends may be declared and paid upon the paid up cash capital, not to exceed, however, five (5) per cent., semi-annually in January and July. The remainder of the profits to be applied pro ratia on payment of stock carried to the surplus funds, and may be loaned in fair proportions at the various branches, upon unincumbered real estate.

SECTION XVIII.

All persons sustaining loss or damage by fire on property insured by this company, shall forthwith give notice thereof to the secretary, or some duly authorized agent of the company, and within thirty days after the said loss or damage, deliver a particular account of the same, verified by oath or affirmation; and the
71 same general rule shall apply in case of loss from other causes.

SECTION XIX.

All claims for loss or losses against this company shall be due and payable at the office of the company, or the agency from which such policy of insurance issued, within sixty days from date of approval of such claim.

SECTION XX.

This company reserves the right to cancel the stocks of any stockholder for the non-payment of any instalment due said company, by refunding to said stockholder the amount paid on said stock, or reducing the amount of said stock, and issuing to him fully paid up stock for the amount actually and originally paid thereon, at the rate of one hundred cents on the dollar. This company shall have a lien upon the stock of each member to

72 secure the payment of any note or instalment, or proportion thereof, as may be required, for the space of thirty days after notice of the same shall have been made by the secretary. The board of directors, or executive committee, may realize upon such stock as they may deem the interest of the company requires, and the proceeds received therefor shall be applied in payment of such note or instalment.

SECTION XXI.

The stock of this company shall be transferable either in person or by power of attorney, by signing the transfer forms provided in the office of the company, at Chicago, Illinois.

SECTION XXII.

Holders of stock claiming a loss of their certificate shall advertise the same in a daily paper of this city, for two consecutive days, otherwise no duplicate certificate shall be issued, and the
73 board of directors may require a bond of indemnity in such cases.

SECTION XXIII.

The books for the transfer of stock in this company shall be closed ten days previous to each annual election.

SECTION XXIV.

It shall be the duty of the President and Secretary to call a meeting of the stockholders whenever they shall receive the written request of five stockholders, representing in the aggregate fifty thousand dollars of stock. Such request shall contain a statement of the matters to be brought before such meeting, and no other matters shall be brought before such meeting. No such meeting shall be called upon less than five days notice, which notice may be given by publication in one or more papers published in Chicago, but at the time of the publication of such notice it
74 shall be the duty of the secretary to mail to the postoffice address, if known, of each stockholder a notice of such meeting, with a statement of the object thereof.

SECTION XXV.

Every person who shall subscribe for $10,000 stock, and pay twenty per cent thereof, shall be constituted a director of this company, and shall continue such director so long as he shall retain of such stock an amount equal to $10,000, but such $10,000 of stock shall not be reckoned or represented in the election of other directors.

*Branch Offices.*

SECTION XXVI.

In every city or town where ten thousand dollars or more of stock

shall be subscribed, and twenty per cent. paid up thereon, there shall be established a Branch Office, and the stockholders
75 thereat may meet at once and elect one of their own number as President of such Branch, and elect one director of such branch for every ten thousand dollars of stock taken and paid for as aforesaid at such place, and such directors shall be *ex-officio* directors of the company. The president and directors so chosen shall hold their office until the first annual meeting on the fourth Wednesday of the ensuing December, or until their successors are chosen. The annual meeting of the stockholders of each branch for the election of the president and directors of the branch shall be held on the fourth Wednesday of December in each year.

A record of all such meetings shall be preserved, and a copy of the same forwarded immediately to the Home Office. The
76 President of such Branch shall preside at all meetings thereof, but in the absence of the President, the stockholders in regular meeting may designate one of their own number to preside. The agent at each Branch shall be styled a manager, and shall act as Secretary at all meetings, and give notice of same, and also immediate notice to the Home Office of any action taken.

At the annual meeting of the stockholders, report shall be made by the Secretary of the number of persons who have been chosen Directors of Branch Offices, and who are *ex officio* Directors of the Company, and there shall then be elected only such number of Directors as will make, with such *ex officio* Directors, one Director for every ten thousand dollars stock issued.

SECTION XXVII.

These By-Laws may be added to, altered or amended at
77 any annual meeting of the corporation, or any special meeting called for the purpose by a majority vote of the stockholders present, or their authorized proxies.

SECTION XXVIII.

At the annual meetings the following shall be the

*Order of Business.*

1. Calling Roll.
2. Reading reports of officers, and dispositions of the same.
3. Reports of standing committees.
4. Reports of special committees.
5. Unfinished business.
6. Election of officers.
7. New business.

78 Defendant, on his part, offered evidence tending to show that he was induced to take 100 shares of stock in the Great Western Insurance Company, upon the representation of one Overton, an agent of the company, with power to solicit and take sub-

scriptions to stock, residing at Bloomfield, Iowa; that 20 per cent. of said stock only had to be paid in any event, and that said stock, as to the 80 per cent., was "non-assessable" and created no personal liability and that the stock certificates were so endorsed to show such non-liability, and that said Overton, to induce defendant to subscribe, exhibited to defendant, at the time, a blank certificate, a specimen of the stock with the words "non-assessable" printed across the face thereof in large letters, being a copy or form similar to that subsequently filled up and delivered to defendant by said
79 Overton; that said Overton, to induce the defendant to subscribe, also represented that the company's officers had taken the opinion of some of the best lawyers in Chicago and that they had advised them that such a contract was legal under the laws of the State of Illinois, and imposed no personal liability for the 80 per cent. in any event or upon any contingency.

Defendant offered evidence tending to show that about the time he received said certificate of stock he executed his negotiable note payable to the order of the Great Western Insurance Company for 20 per cent of the amount subscribed, to-wit: for the sum of $2000, and executed a mortgage on real estate to seeure the same for the payment of said 20 per cent., and that at the time said note
80 and mortgage were given, it was stated by the agent, Overton, to induce the defendant to consummate the transaction, that the note should be in full payment of the stock. The evidence further tended to show that three or four days before defendant agreed to take said stock, that Overton had left with defendant a printed copy of the articles of incorporation and by-laws of the company, and that defendant had not read them. Evidence was given tending to show that the agent, Overton, to induce defendant to subscribe, represented to defendant, when the note and mortgage were given, that said note and mortgage should remain at Bloomfield, under the sole control of the officers of the Branch at Bloomfield, which said agent represented would be established there and would be collected only as they needed the same to
81 pay losses, and that the company would not sell or transfer them or remove them from the Bloomfield Branch. Defendant introduced Overton, who testified on cross-examination that he did not represent that the note and mortgage would remain at Bloomfield, under the control of the officers of the Branch, but that he did represent that the company would treat them as for a loan of money to defendant, and that the company would extend the time of payment until they needed the money, and that the company would not sell or transfer the note and mortgage. Evidence was also offered tending to show that at the time defendant first subscribed for the stock, he signed a subscription paper for 100 shares of the capital stock that had upon it the conditions "that
"20 per cent. of the stock was to be paid in four install-
82 "ments, 5 per cent. of the stock when the certificate of stock "was delivered, 5 per cent. in three months, 5 per cent. in "six months, and 5 per cent. in nine months, and the other 80 per "cent. to remain on subscription until paid by accumulation of "profits on business," and that when the subscription was signed it

was agreed that defendant should give the notes secured by mortgages for the $2000 when the stock was delivered, and that the subscription papers should be given up and cancelled, and there was evidence tending to show that the subscription paper subscribed by the defendant had accordingly been given up by the company to be cancelled. The evidence tended further to prove that the subscription paper had been furnished Overton by the secretary of the company to obtain subscription, and also the
83 form of certificate marked "non-assessable," had been furnished Overton by the secretary of the company for the same purpose, being the form of certificate set up in the answer, and had authorized him to make the said representations in regard to the 80 per cent. which he made to defendant, and had told him what he told defendant in regard to the 80 per cent., and that it imposed, and could and would create no personal liability on defendant.

Defendant further introduced in evidence the depositions of two members of the executive committee, both witnesses having been members of the executive committees of the company, who testified that the executive committee had passed the resolutions quoted in the charge of the court to the jury, that the record of such resolutions was burned, but one witness said he had the original memoranda of the proceedings taken by him as secretary of
84 the executive committee, and gave a copy in his said deposition, the same as appears in the charge of the court. That shortly after the passage of such resolution, a new form of certificate, being the same in form as the one delivered to defendant, was provided by the officers of the company, and put into the hands of its stock agents, with instructions to use the same in placing stock, and this was shortly before the defendant subcribed for stock. That evidence was produced to show that defendant was a citizen of Iowa, and was ignorant of the laws of Illinois, and of the charter of the company, and believed the statement of the company's said agent, that the stock was "non-assessable," and that he could never in any event be made liable to pay any part of the 80 per cent. and that the company could not collect the 80 per
85 cent. and that he never suspected any liability as to said 80 per cent. or that the said representations as to the laws of Illinois were false, until the agent of the assignee, made a demand upon him for the 80 per cent. in the year 1873, and that as no claim had been made upon him, he never made any investigation as to the truth of such representations until after said demand in 1873, and evidence was offered tending to show that said defendant relied upon said representations, and was induced thereby to take nominally, and a large amount of stock. Defendant further offered evidence to show that in the month of February, 1871, he learned that his note and mortgage had been sold and transferred by the company to one Waite, and that the said note and mortgage
86 had been sent to the company at Chicago. That he and other subscribers to stock in Bloomfield, thereupon immediately sent Mr. Overton to Chicago, as their agent to demand a re-

turn of said note and mortgage, and similar notes by others, alike representations and to offer to surrender the stock.

That Overton did go to Chicago and demand the defendant's said note and mortgage, and offered to surrender the stock certificate of the defendant, this was in February, 1871. That the officers of the company stated in reference to the defendant's stock they could not do anything about it that they did not have the note and mortgage, that they had them, and they refused to receive the stock certificate or to surrender defendant's notes and mortgages for the 20 per cent. Overton testified that he thinks he took the certificate of stock of said defendant with him when he went to Chicago. Defendant
87 testified that he thought Overton did not take the certificate. Defendant further testified that he, afterwards, in June, 1871, went to Chicago in person and made the same offer and demand of the company and its officers, and received the same answer and refusal, but had not his certificate with him at Chicago at that time, but the refusal of the company was not based upon the absence of the stock certificate. There was no evidence that at any time when there was an offer to surrender the stock, and a demand for the return of the notes anything was said about any fraudulent representations as to the non-assessable character of the stock, or as to the 80 per cent.

That the demand and offer was based solely on what was represented as to what should be done with the notes and mort-
88 gage, and the establishment of the branch which were claimed to the company to have been fraudulent representations. When the offer to surrender the stock was made defendant claimed that he made the offer because he had been deceived and defrauded. It was further proved on the trial and evidence offered tending to show that the company had declared a dividend upon the amount of actual payment on stock of 5 per cent., and had declared a dividend in favor of defendant for $100.00. And that on the first day of August, 1871, a draft was received by defendant for said $100.00 from Overton by directors of the company and signed by him, and that he retained the same in his posession two or three weeks, until the 25th or 26th of September, 1871, when he returned the same to Overton, the Secretary of the Branch
89 and agent of the Company at Bloomfield, and that defendant's purpose in retaining said draft was to consult counsel and ascertain his legal rights. That a short time prior to the 25th of September, 1871, a draft was drawn upon defendant through the bank at Bloomfield, Iowa, for the payment of the interest falling due on his note and mortgage for $2,000. That defendant refused to pay the same, and replied to Ellis, cashier of the bank, that if he paid it he would not pay it until he could see it credited on his note, that he could not trust the company or its officers. That Ellis sent for and obtained the note and mortgage to be sent to him at Bloomfield. That when he had received the same the defendant, September 25, 1871, commenced his suit of replevin against said Ellis and the bank in the District Court of Davis County, Iowa, and
90 his sworn petition and amended petition in said cause were put in evidence, and were in words and figures following :

| | |
|---|---|
| J. D. TRIBILCOCK, *vs.* First National Bank of Bloomfield, and J. W. ELLIS. | Suit in District Court of Davis County, Iowa, November term, 1870. Replevin. |

To the District Court of Davis County, Iowa:

Your petitioner, J. D. Tribilcock, claims of the defendants, the First National Bank of Bloomfield, J. W. Ellis, the present possession of a certain promisory note dated August 25, 1870, for $2,000, payable to the Great Western Insurance Company of Chicago, Ill., or order Int., 10 per cent, and signed "J. D. Tribilcock," which note is now in the possession of defendants, and is wrongfully detained by defendants, and to the present and immediate possession of said note petitioner is entitled.

91 Petitioner states that saidnote was not taken on the order or judgment of a court again him nor under an execution against him, or on execution against his property or said note. Petitioner states that the apparent value of said note is ($2,000.00) being the amount of the face of said note. That its actual value is not worth exceeding one hundred dollars, being as much as it would be worth as evidence in a suit pending. Petitioner avers that the alleged cause of detention is this: That the Great Western Insurance Company of Chicago, Ill., sent said note to said defendants in order that said defendants might make a demand for payment on this plaintiff.

Petitioner further states, that said note was obtained from him by fraud, and is void; and that it was wrongfully and fraudu-

92 lently sent to Chicago, Illinois, and placed there as he is advised under the control of said insurance company, and was obtained for that purpose, as petitioner now believes when plaintiff was told at the time of the execution of said note, that it should remain under the control of certain men apparent friends of plaintiff, including plaintiff himself. Plaintiff states that prior to the execution of said note, an insurance company had been organized at Bloomfield, Iowa, called the Southern Iowa Insurance Company, and that plaintiff had been fully advised that the stock subscribed to said Iowa Insurance Company, was subscribed upon condition that no part of the stock should be paid except to meet losses by fire if any occurred, and then only to be paid as assessments should be made, and that the stock subscribed to said Iowa Insur-

93 ance Company, was to remain in the hands of said company, and not to be parted with, but at all times to be subject to the control of the members of said company. That the agents of said Great Western Insurance Company, who were stockholders and the persons who organized the Iowa Insurance Company, desired to consolidate said company, with the Great Western Insurance Company, called on plaintiff, and requested him to take stock in said Great Western Insurance Company, in place of other stockholders in the Iowa Insurance Company, who would not favor a consolidation of said company, with the Great Western Insurance Company, and represented that if he would so do, the stock would be treated and controlled the same as the stock of the said Iowa Insurance Company.

That the subscription of stock at Bloomfield, Iowa, to the Great Western Insurance Company, should be held by stockholders
94 at said place, and remain under their control, the same as the stock in the Southern Iowa Insurance Company, at Bloomfield, had been controlled; that while said Southern Iowa Insurance Company would become a branch of said Great Western Insurance Company, it should be distinct in the control of the stock taken at Bloomfield, so far as to the controlling of said stock, and that no part of said stock to be paid except to meet losses which would make assessments necessary; and further represents (that said parties) agent of said Great Western Insurance Company, explained, or pretended to explain to plaintiff, the mode and manner of the business of said Southern Iowa Insurance Company, and that the business of the Great Western would be controlled in the same way, and that plaintiff relied upon said statements so made as true, and agreed to take stock to amount of $2,000. That he signed a
95 paper which he then supposed would be sufficient for this purpose and contained the requisite stipulations to protect the rights and give him the benefit of said contract, and all its provisions. He says that all such representations with respect to said subscription were false, and that the purpose was to get plaintiff to sign a negotiable note, and then to sell it or compel plantiff to pay it, and this to defraud plaintiff out of said amount of $2,000. That he, by said representations was pursuaded and prevailed on to take subscription and to sign a certain contract to that effect, which contract he now learns, though he did not know it at the time, is a negotiable note, being the note herein described.

So plaintiff charges that said note was obtained by fraud, and it is void; and he states that if he does not now obtain possession of it, it would be sent to Chicago, Illinois, (as he
96 believes), and put him to great trouble and expense in and about defending against said note. He therefore prays that a writ of replevin issue in this cause, and that he be put into possession of said note by virtue of said writ. Also prays judgment for possession of said note, and for the right to retain the property therein, and for costs of suit, and for $50 damages for the wrongful detention of said note.

J. D. TRIBILCOCK, Petitioner.

Subscribed to before me and in my presence, by J. D. Tribilcock, and before me sworn to by him, on this, Sept. 25, 1871.

Given under my hand and Notarial seal date last above written.

S. S. CARRUTHERS,
Notary Public in Davis Co., Iowa.

The above was endorsed as follows. to-wit: Filed Sept. 26, 1871.
A. H. HILL, Clk.

97 J. D. TRIBILCOCK
*vs.*
1ST NATIONAL BANK and J. W. ELLIS.

The petitioner, for amended petition, says that when said Over-

ton, speaking as the mouth piece of said unknown agent of the pretended Great Western Insurance Company, was obtaining said note, he, plaintiff, and Overton were negotiating about the matter, he (Overton) represented that said Branch Company was so far organized as to be ready to receive and hold said note as such Branch Company, and that said Branch Company would receive, hold and control the same, the stockholders being and having the right, under the organization, to hold and control said note. That thereupon he, plaintiff, executed and delivered said note to Overton, as the agent and trustee of said Branch Company, believing that he, Overton, was authorized, as agent and trustee, to
98 receive it for said Branch Company, and believing that it would remain under the control and possession of said Branch Company, and that he, plaintiff, would be called on to pay, pursuant to order of said Branch Company on assessessment to meet actual losses by fire. Plaintiff says that he never delivered or intended to deliver said note to the agent of the Great Western Insurance Co., or to said Great Western Co., and that the said Great Western Insurance Company in some wrongful and fraudulent manner got possession thereof. Plaintiff says further he is now advised that said Branch Company was organized so to govern and hold and control said note, together with such other notes as might be given for the purpose, but that said representation about the existence of such a Branch Company was false and fraudulent, and that they did deceive and induce the giving of said note. That said Great
99 Western Company have no right to said note, do not owe it and never did.

J. D. TRIBILCOCK, *Plaintiff.*

On the back of the above paper was an endorsement in words and figures as follows, to-wit :

Filed June 6th, 1872.

A. H. HILL, *Clerk.*

And defendant having closed his case plaintiff offered as witnesses the President and Vice President and Secretary of the Company and one C. B. Waite, who gave evidence tending to rebut the evidence offered by defendant as to the offer to surrender the stock and demand of the notes. And plaintiff further offered the evidence of said officers tending to show that they had formerly issued certificates of stock of the following form :

"THE GREAT WESTERN INSURANCE COMPANY—

" *Capital Stock $500,000, with liberty to increase to 5,000,000 dol-*
" *lars, Number 61; Shares 50. Organized July 20th, 1857,*
" 100 *under Act of Legislature, approved March, 4th, 1857.*

"This is to certify that ——— is entitled to ——— shares in "the capital stock of the GREAT WESTERN INSURANCE COMPANY "of CHICAGO, ILLS., of ONE HUNDRED DOLLARS each, transferable "only on the books of the Company in person or by attorney on

"the surrender of this certificate, being subjet to the Charter and "By-Laws of said Company, of which twenty per cent. is payable "as follows: Five per cent on receipt of stock certificate; five "per cent in three months from date hereof; five per cent in six "months from date hereof; five per cent in nine months from date "hereof, the balance being subject to the call of the directors as "they may be instructed by the majority of the stockholders rep-"resented at any regular meeting. Ten per cent annual dividend
"from the surplus earnings guaranteed to stockholders on
101 "cash capital paid in.
"Chicago, Ills., ——18—.
"[Revenue Stamp.]

"J. D. WOODWARD, Secretary.
"T. S. MAJOR, President."

[Across the face of the above certificate is written the following figures, to-wit: "$100."]

Plaintiff further offered evidence tending to show that the reason why said notes of defendant were sold by the company was that the Auditor of State of the State of Illinois had refused to regard any securities of the State as cash assets required under their law, and they had been exchanged for such as were in the State, and that defendant and Overton were so advised when complaint was made, that same had been disposed of. Evidence was offered to show that the company was solvent and did business until the great
Chicago fire in October, 1871, and that in the statement
102 made by the company under the laws of Iowa to the Auditor of State, the company did not report any paid of the 80 per cent. as capital, nor give any list of the stockholders or subscribers to its stock.

The original certificate of stock issued to the defendant is hereto attached and is also to be attached to the transcript to be sent to the Supreme Court:

THE GREAT WESTERN INSURANCE COMPANY.

CAPITAL STOCK, $500,000, WITH LIBERTY TO INCREASE TO 5,000,000 DOLLARS.

*Number 1114.* *Shares, 100.*

ORGANIZED JULY 20TH, 1857, UNDER ACT OF LEGISLATURE. APPROVED MARCH 4TH, 1857.

This is to certifiy that J. D. Tribilcock is entitled to one hundred shares in the capital stock of the Great Western Insurance Company of Chicago, Illinois, of one hundred dollars each, of which twenty per cent. is payable as foliows: Five per cent. on receipt of stock certificate; five per cent. in three months from date hereof; five per cent. in six months from date hereof; five per cent. in nine months from date. Transferable only on the books of the company, in person or by attorney, on the surrender of this certificate; being subject to the charter and by-laws of said corporation and laws of the State of Illinois.

Dated at Chicago, this twenty-sixth day of August, in the year of Our Lord one thousand eight hundred and seventy.

H. L. STEWART,

C. D. HOOKER, *Secretary.* *President.*

[United States Internal Revenue, twenty-five (25) cents. Insurance.]

On the back hereof was endorsed the following:

For value received.....hereby sell, transfer and assign to..... .....the shares of stock within mentioned and authorize.....to make the necessary transfer on the books of the company.

Witness.....hand and seal this.....day of..... 18..

Witnessed by .....[SEAL.]

This is the original certificate of stock introduced in evidence on the trial of the case of C. W. Upton, Assignee, against J. D. Tribilcock, and referred to in the bill of exceptions in said cause, and transmitted with the transcript in said court, pursuant to the order of this court.

*Attest:* GEORGE B. CORKHILL,
*Clerk U. S. Circuit Court, District of Iowa.*

Evidence was given tending to show that after the resolution of the Executive Committee to issue "non-assessable" stock, this kind of stock was issued and sold generally in different places in the State, and to about a dozen other persons than the defendant at Bloomfield. That the foregoing gives a sufficient issue of the nature of the evidence necessary for a full understanding of the charge of this court, and to show the materiality of its rulings upon the instructions asked for, and refused by the court, and is here
103 certified by the court and ordered to be made a part of the record.

Whereupon the plaintiff asked the court in proper form and time to give the jury the following instructions.

In the United States Circuit Court.

UPTON, assignee of the Great Western Insurance Company,
*vs.*
J. D. TRIBILCOCK.

Plaintiff asks the court to instruct the jury as follows:

1st. That this is a suit by the assignee in bankruptcy of the Great Western Insurance Company, claiming of defendant certain 80 per cent. of stock alleged to have been taken and held by said defendant in the Great Western Insurance Company.

2d. That any contract between the company or its agents and

the stockholders limiting their liability as to unpaid instal-
104 ments of stock is void as to creditors of the company and as as to the rights of the assignee who represents the creditors in this action.

3d. That if the jury find from the evidence that defendant, J. D. Tribilcock became a stockholder of the Great Western Insurance Company, in the month of August, 1870, and that he continued to own and hold said stock, until after the insolvency of the company in February, 1872, that any representations by any agent of the company at the time defendant became such stockholder as to the matter of his liability for 80 per cent. of the stock or any endorsement on the stock of the words "non-assessable" are wholly immaterial, and constitute no defense to this action.

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4th. That ~~all~~ offer to surrender this certificate of stock by defendant, and a refusal of the officers of the company to accept of such surrender did not dissolve the relation of defendant as a
105 stockholder in the company.

5th. That if defendant gave to the Insurance Company, or its agent, his negotiable note for 20 per cent. of his stock upon a ~~premium~~ or representation of the agent, that said note would be held by the company, and not to be sold or assigned, and if the company did violate such promise or understanding, and sold the note or exchanged it for other securities, that such facts alone did not justify a demand of the cancellation of defendant's stock, and his offer to surrender the stock on that ground alone, and upon conditions that the notes be delivered up if proved constitutes no surrender of the stock, and did not release defendant from his liability as a stockholder of the company to the creditors thereof.

promise

6th. That the action of replevin begun by defendant upon the petition offered in evidence was not a proceeding to cancel
106 his stock, or to dissolve his relation to the company, as a stockholder, and cannot have any such effect in his cause.

7th. That if he, defendant, offered to surrender his stock to the officers of the company, but not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the 80 per cent. but upon another ground, to-wit: that the company had sold and assigned his note and mortgages, then the evidence of such offer to surrender is immaterial, and the evidence of fraud as to such misrepresentations as to his liability for the 80 per cent. can not be made available in this suit, and constitute no defense in this action.

8th. That if the jury find from the evidence that defendant was induced to become a stockholder of the Great Western Insur-
107 ance Company, in the month of August, 1870, upon representations of the agent of the company, that his stock was non-assessable, and that under the laws of the State of Illinois, the company had a right to make such a contract, and if defendant did not discover that such representations were false until after the insolvency of the company, and a demand on him by the assignee in bankruptcy for the 80 per cent. that such discovery is too late to avail defendant, as against the creditors and the assignee in bankruptcy and proof of such false representations constitute no defense to this suit.

9th. That if defendant became a stockholder of an Insurance Company organized under the laws of the State of Illinois, it was his duty to know the effect of his contract and the extent of his legal liability, and he cannot avail himself in this action of
108 his ignorance of the law of Illinois, or that the extent of his liability under that law was misrepresented to him by the agent of the company, to induce him to take stock.

10th. That if you find from the evidence that a copy of the by-laws and charter of the company in printed form was furnished to defendant three or four days before he became a stockholder, and that he became a stockholder without reading them and relied on a statement of the company's agent that he would not be liable for 80 per cent of the stock, and that the stock was non-assessable, that defendant is in fault and cannot avail himself of such misrepresentations against creditors.

11th. That if the jury find from the evidence that the defendant, Tribilcock, became a stockholder of the Great Western Insurance Company, in August, 1870, and that he gave his negotiable note, secured by mortgage, for 20 per cent. of the stock, and was assured by the agent of the company at the time he took said stock
109 and gave said note and mortgage, that said note would not be sold or transferred by the company, and that the other 80 per cent. of the stock would remain on subscription to be paid when the profits arising from dividends should be sufficient to pay the same, and that said stock should be non-assessable, and that afterwards the company transferred the note before its maturity, and that defendant ascertained the same and claimed to the officers and agents of the company that they had violated their contract and acted in bad faith with him, in disposing of said note and mortgage, and that he offered to surrender his stock if they would surrender his note, and that the officers and agent of the company refused to accept the stock and surrender the note, and stated they could not do so for the reason they no longer held said notes, and if the jury further find that the untruth of the representations in regard
110 to the non-assessable character of the stock were unknown to the defendant at that time, and that he did not discover that the said represensations were untrue until after the bankruptcy of the company and a demand by the assignee for the 80 per cent. in 1873; that in a suit by the assignee in bankruptcy these facts do not constitute a defense to the action for the 80 per cent. of the stock.

12th. That if defendant was induced in August, 1870, to become a stockholder of the Great Western Insurance Company, by a representation of the agent of the company that 80 per cent. of the stock was non-assessable, and that the Laws of the State of Illinois allowed the company to make such contract with those who took stock, then it was the duty of the defendant to use reasonable dilligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject; that if he
111 did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the company in 1872, then he can not, as to the creditors of the company,

maintain any defense by means of such representations. The court instructs you, as a matter of law, that defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of defendant; that bars such defense as to the assignee.

And the court refused each and every of said instructions, to which refusal as to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th instructions, and each and every of them so refused by the court, the plaintiff in due time and form then and there *excepted*, and this, his bill of exception, is duly signed by the court and ordered to be made a part of the record.

112 Whereupon the court charged and instructed the jury upon its own motion, as follows, as being the only and all the instructions given to the jury.

United States Circuit Court, District of Iowa, October Term, 1874.

C. W. UPTON, assignee, of Great Western Insurance Company,
*vs.*
J. D. TRIBILCOCK.

Court's Charge.

*Gentlemen of the Jury:*

The Great Western Insurance Company of Chicago failed soon after the great fire of that city which occurred in October, 1871.

The plaintiff is its assignee in bankruptcy and sues the defendant whom it claims to be the holder of 100 shares of its stock, of $100 each, each for 80 per cent., or $8000.00 remaining unpaid on such stock. The defense in substance is that the defendant was induced to subscribe for the stock by the false and fraudulent representations of the agents of the company who procured the defend-

113 ants subscriptions therefor, and that upon the discovering of the fraud the defendant tendered back to the company the certificate of stock he had received and repudiated the contract, and offered to rescind it. The certificate of stock issued to the defendant by the company is as follows:

THE GREAT WESTERN INSURANCE COMPANY.

*Number 1114.* *Shares, 100.*

CAPITAL STOCK, $500,000, WITH LIBERTY TO INCREASE TO 5,000,000 DOLLARS.

ORGANIZED JULY 20TH, 1857, UNDER ACT OF LEGISLATURE. APPROVED MARCH 4TH, 1857.

This is to certifiy that J. D. Tribilcock is entitled to one hundred shares in the capital stock of the Great Western Insurance Company of Chicago, Illinois, of one hundred dollars each, of which twenty per cent. is payable as follows: Five per cent. on receipt of stock certificate; five per cent. in three months from date hereof; five per cent. in six months from date hereof; five per cent. in nine

months from date. Transferable only on the books of the company, in person or by attorney, on the surrender of this certificate; being subject to the charter and the by-laws of said corporation and laws of the State of Illinois.

Dated at Chicago, this twenty-sixth day of August, in the year of Our Lord one thousand eight hundred and seventy.

[Signed] H. L. STEWART,
C. D. HOOKER, *Secretary.* *President.*

The defendant has introduced evidence that a short time before the date of the defendant's said certificate of stock, the executive committee of the company, according to the minutes of the company, met, and the following proceedings were had by the committee:

*Minutes of Executive Committee.*

"A communication was received from the president and secretary "of the company, stating that the agents of the company appointed "to make sale of the stock of the company had reported to them "that they were unable to sell the stock as the certificates were "then being issued, with twenty cents paid, for the reason that
"those contemplating the purchase of stock were afraid of
116 "being made liable for eighty cents more, notwithstanding
"the assurances of our agents that the twenty cents paid was "all they would ever have to pay. Dr. Sherman, one of the stock "agents of the company, being present, stated to the executive "committee that from his experience in endeavoring to sell the "stock of the company, he was satisfied in his own mind that it "could not be placed while the question of liability was left, as it "seemed to many people, indefinite, notwithstanding the assurances "that twenty cents would be all that they would ever have to pay. "After further consultation the following resolution was offered and "adopted, to-wit:

"RESOLVED, That the twenty cents paid and endorsed on the
"certificates of stock of the Great Western Insurance Com-
117 "pany, shall be in full payment of the stock so issued, and
"that the words, "NON-ASSESSABLE" shall be printed across "the face of every certificate of stock; also, be it further *Resolved*, "That all persons having heretofore subscribed to the capital stock "of the company shall be authorized to exchange the existing issue "of stock now in their possession for the new form of certificate, "and the president and secretary are hereby directed to make the "exchange of certificates in accordance with the spirit of the fore-"going resolution, and to immediately send copies of the above "resolution to all stock agents of the company now in the field."

Whether these minutes are authentic, and such resolutions were passed, you are to determine from the evidence.

If you believe from the testimony in this case that soon afterwards the company in Chicago changed the form of their stock
certificates, and got up forms like the one issued to the
118 defendant above mentioned, with the words "non-assessable"

conspicuously printed on the end thereof; that the agent of the company solicited the defendant, at Bloomfield, in Iowa, to become a subscriber to the stock of the company; that said agent represented to the defendant, to induce him to subscribe, that he would in no event or in any manner become liable for the 80 per cent.; that that was the meaning and purpose of the words "non-assessable"; that the charter of the company and the laws of the State of Illinois authorized the issue of stock of this character, on which there should be no liability beyond the 20 per cent.; that the company had consulted good lawyers in Chicago, who had given their opinion that the "non-assessable" stock of the company was legal—if such representations were made by the company's agent to the defendant, and if the defendant, believing these rep-
119 resentations to be true, thereupon subscribed a paper for 100 shares stock, which, as respects the 80 per cent. now in suit, read as follows: "The balance, 80 per cent., stands on sub-"scription, without interest, until *paid by the accumulation of profits* "*on business,*" and if it was part of the contract that when the 20 per cent, were paid up the contract of subscription was to be surrendered to the subscriber and cancelled; then if you find that the defendant relied upon such representations and believed them, and made the subscription and afterwards received the stock certificate upon the faith of snch representations, and upon the belief thereby induced that he would incur in no event any personal liability in respect to this 80 per cent., you are justified, if these facts are proved, in finding that the defendant was induced to become a shareholder in the company, by fraudulent, and deceptive represen-
120 tations, such representations as to the charter of the company, and the laws of another State, aided by the artful and deceptive form of the certificate itself, are of such a character that it can not be said as a matter of law, that the person to whom they were made, had no right to rely upon them. The plaintiff's counsel has not contended before you that the defendant did not make the subscription in consequence of such representations, but he contends that as respects the assignee, who represents the rights of the creditors of the company, there has been no such vigilence on the part of the defendant, in discovering the fraud and no such steps in repudiating it as to exonerate him from liability to the present plaintiff. Now, I instruct you, that as respects creditors the law requires of one who has been drawn by fraud into
121 the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud; and on discovering it promptly repudiating the purchase. If you find from the evidence, that within a few months after receiving the stock certificate, the defendant discovering that he had been deceived in some respects, procured the agent who had obtained his subscription, to go to Chicago, delivering to such agent his stock certificate, and instructed the agent to surrender or offer to surrender the stock, and demand back the note for the 20 per cent. and if the agent accordingly went to Chicago, and offered to the company to surrender the stock and rescind the contract which the company refused, and if you find that the defendants never afterwards, at any

time acquiesced in being a member of the company. That in September, 1871, he brought an action of replevin for the note,
122 based on the ground of fraud; and if afterwards he refused to receive any dividend on his stock and returned a draft sent to him by the company, for such dividend, and if all this took place before the bankruptcy or insolvency of the company, I instruct that in point of law this is a sufficient repudiation of the contract to become a stockholder to enable the defendant, living in another State, to resist an action for the payment of the 80 per cent. provided you find that the defendant was induced to become a stockholder by fraud, as before explained; and also further find, in view of all the circumstances that the defendant was not unreasonably negligent in discovering the fraud, and that he was guilty of no want of reasonable diligence in taking steps to repudiate the transaction under the laws of Illinois, there is no *public registry* of the shareholders of such corporations and it is not indispen-
123 sibly necessary in order to exonerate from liability one who has been defrauded into becoming such stockholder, especially if he lives in another State, that he must at his peril discover the fraud, and institute judicial proceedings against the company, to annul the contract before the bankruptcy of the company. If you find that after discovering the fraud, the defendant claims was practiced upon him, he acquiesced therein, and consented to waive the fraud, and determined to abide by the company, then the defendant has no defense to this action, for in cases of this kind "a man must not play fast and loose; he can not say I will abide by the company if successful, and I will leave the company if it fails; and therefore, when a misrepresentation is made of which the shareholders
124 has notice, and can take advantage of to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company, or whether he will remain a member."

(Signed) JOHN F. DILLON,
*Circuit Judge.*

To which charge of the court, and to each and several parts thereof, after the statement of the cause as therein set out, plaintiff, in due form and time excepted. The plaintiff excepted to so much of said charge as instructs the jury, to-wit:

"If you believe from the testimony in this case that soon after-
"wards the company in Chicago changed the form of stock cer-
"tificates, and got up forms like the one issued to the defend-
"ant with the words 'non-assessable' conspicuously printed on the
"end thereof; that the agent of the company solicited the defend-
"ant, at Bloomfield, Iowa, to become a subscriber to the stock of
"the company; that said agent represented to the defendant, to in-
"duce him to subscribe, that he would in no event or in any
125 "manner become liable for the 80 per cent.; that that was
"the meaning and purpose of the words 'non-assessable';
"that the charter of the company and the laws of the State of Il-
"linois authorized the issue of stock of this character, on which

"there should be no liability beyond the 20 per cent.; that the com-
"pany had consulted good lawyers in Chicago, who had given
"their opinion that the 'non-assessable' stock of the company was
"legal—if such representations were made by the company's agent
"to the defendant, and if the defendant, believing these represent-
"ations to be true, thereupon subscribed a paper for 100 shares
"stock, which, as respects the 80 per cent. now in suit, reads as
"follows: 'The balance, 80 per cent., stands on subscription, with-
"'out interest, until *paid by the accumulation of profits on*
126 "'*business*,' and if it was part of the contract that when the
"20 per cent, were paid up the contract of subscription was
"to be surrendered to the subscriber and cancelled; then if you
"find that the defendant relied upon such representations and be-
"lieved them, and made the subscription and afterwards received
"the stock certificate upon the faith of snch representations, and
"upon the belief thereby induced that he would incur in no event
"any personal liability in respect to this 80 per cent., you are just-
"ified, if these facts are proved, in finding that the defendant was
"induced to become a shareholder in the company, by fraudulent,
"and deceptive representations, such representations as to the char-
"ter of the company, and the laws of another State, aided by the
"artful and deceptive form of the certificate itself, are of
127 "such a character that it can not be said as a matter of law,
"that the person to whom they were made, had no right to
"rely upon them."

To which plaintiff excepted for the reason that said instruction does not in effect charge the jury that the false representation as to the legal effect of the contract entered into, was in law a fraud, and that defendant was excused from knowing the law of the corporation of which he desired to avail himself of the benefits, and by his own ignorance to excuse himself from its burdens and liabilities.

The plaintiff further excepted to so much of said instruction as contains the following:

"Now, I instruct you that as respects creditors the law requires of
"one who has been drawn by fraud into the purchase of stock,
"that he shall be guilty of no negligence or want of reas-
128 "onable care in discovering the fraud; and on discovering
"it, promptly repudiating the purchase"—

For the reason that the evidence shows no diligence, but on the contrary, gross negligence of the defendant in discovering the pretended fraud, and for the reason that there was no evidence tending to show any discovery of said alleged fraud until after insolvency of the company, and that no fraud could be predicated of said fact. The plaintiff further excepted to the following portion of siad charge:

"If you find from the evidence, that within a few months after re-
"ceiving the stock certificate, the defendant discovering that he
"had been deceived in some respects, procured the agent who had
"obtained his subscription to go to Chicago, delivering to such
"agent his stock certificate, and instructed the agent to sur-

129 "render or offer to surrender the stock, and demand back "the note for the 20 per cent., and that the agent according- "ly went to Chicago, and offered to the company to surrender the "stock and rescind the contract which the company refused, and if "you find that the defendant never afterwards, at any time, acqui- "esced in being a member of the company, that in September, "1871, he brought an action of replevin for the note, based on the "ground of fraud, and if afterwards he refused to receive any divi- "dend on his stock, and returned a draft sent to him by the com- "pany for such dividend, and if all this took place before the bank- "ruptcy and insolvency of the company, I instruct that in point of "law this is a sufficient repudiation of the contract to become a "stockholder to enable the defendant, living in another State, to "resist an action for the payment of the other 80 per cent.,
130 "provided you find the defendant was induced to become a "stockholder by fraud, as before explained, and also further "find, in view of all the circumstances, that the defendant was not "unreasonably negligent in discovering the fraud, and that he was "guilty of no want of reasonable diligence in taking steps to repu- "pudiate the transaction."

The exception is for the reason that said instruction charges the jury in relation to the discovery of fraud, and a repudiation of the contract of subscription based upon the theory that the sale by the company of the negotiable promissory note given by defendant was a fraud, and that the promise of the agent in regard to the non-transfer of the same was a matter upon which the charge of fraud could be predicated, there being no evidence of any action
131 of replevin or repudiation based upon any other ground than that the note and mortgage had been transferred by the company. That the evidence clearly shows, and there was no conflict of evidence upon the question as to when the defendant discovered or suspected any liability as to the 80 per cent. and that it was long after the insolvency of the company. Plaintiff, also excepted to that part of the charge, for the reason that no offer to surrender the stock refused by the officers of the company could have the effect to dissolve defendant's relation to the company, as a stockholder. Plaintiff further excepted to that part of the charge "which states that "under the laws of Illinois, therere is no *public* "*registry* of the shareholders of such corporations, and it is
132 "not indispensibly necessary in order to exonerate from lia- "bility, one who has been defrauded into becoming such "stockholder, especially if he lives in another State, that he must "at his peril discover the fraud, and institute judicial proceedings "against the company, to annul the contract before the bankruptcy "of the company," for the reason that such is not the law and the court overruled each and all of said objections to which ruling and the giving of each and every of said instructions, the plaintiff, in due form and time excepted, and this his bill of exception is signed by the court, and of the matter hereinbefore set out with the several exceptions are ordered to be made a part of the record and are certified by the court accordingly.

(Signed) JOHN F. DILLON.

133 On the same day, to-wit: October 31, 1874, a writ of error was filed in said clerk's office in said cause, which said writ of error is in the words and figures following, to-wit:

134 UNITED STATES OF AMERICA—*ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the District of Iowa, Greeting:

Because in the record and proceeding, as also in the rendition of a judgment in a plea, which is in said Circuit Court, before you, between C. W. Upton, assignee of the Great Western Insurance Company, a bankrupt, and J. D. Tribilcock, a manifest error hath happened, to the great damage of the said C. W. Upton, assignee, etc., as by his complaint appears; and we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

135 the same at Washington on the second Monday of October next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 28th day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the independence of the United States the ninety-ninth.

(Signed) GEORGE B. CORKHILL,
*Clerk United States Circuit Court, District of Iowa.*
[Seal of U. S. Circuit Court.]

Allowed. JOHN F. DILLON, *Judge.*

[Endorsed:] Filed Oct. 31, 1874.
GEORGE B. CORKHILL, *Clerk.*

136 On the same day said plaintiff, by his said attorneys, filed in said clerk's office his appeal bond in said cause, which said appeal bond is in words and figures following, to-wit:

136*a* In the United States Circuit Court for the District of Iowa, October Term, 1874.

C. W. UPTON, Assignee Great Western Insurance Company,
*vs.*
J. D. TRIBILCOCK.
*Appeal Bond.*

Know all men by these presents, that we, C. W. Upton, as prin-

cipal, and C. C. Nourse, as security, are held and firmly bound unto J. D. Tribilcock in the penal sum of five hundred dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors and assigns firmly by these presents.

Dated this 28th day of October, A. D., 1874.

The condition of this bond is such that, whereas, the said C. W. Upton, assignee, has sued out a writ of error from the judgment or order of the said Circuit Court of the United States for District of Iowa, made at the October term of said court, October, A. D. 1874, in a certain cause in wherein C. W. Upton, assignee, &c., is plaintiff, and J, D. Tribilcock is defendant, to the Supreme Court
136*b* of the United States.

Now, if the said C. W. Upton, assignee, &c., shall pay all costs and damages that shall be adjudged against him, and that he will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the Supreme Court may render or order to be rendered by the said Circuit Court, not exceeding in amouut or value the original judgment or order, and all rents, or hire, or damages to the property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal, and all costs and charges that may be awarded thereon by said court, then this obligation to be void, otherwise to be and remain in full force.

C. W. UPTON,
Assignee in Bankruptcy of the Great Western Insurance Company, Principal.

137 C. C. NOURSE, Security.

Approved this 28th day of October, A. D. 1874.

[Signed] JOHN F. DILLON, *Judge.*

[Endorsed:] Filed October 31, 1874.
GEORGE B. CORKHILL, *Clerk.*

138 On the same day, to-wit: October 31, 1874, there was filed in said clerk's office a citation in words and figures following, to-wit:

139 THE UNITED STATES OF AMERICA—*ss:*

The President of the United States of America, to J. D. Tribilcock:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the 2nd Monday of October next, pursuant to a writ of error filed in the office of the clerk of the United States Circuit Court, for the District of Iowa, wherein C. W. Upton, assignee of the Great Western Insurance Company, is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff, in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Jno. F. Dillon, United States Circuit Judge, for the Eighth Circuit, this 29th day of October, A. D., 1874.

JOHN F. DILLON, *Judge.*

(Indorsed:) Upton, assignee, vs. J. D. Tribilcock. Citation. Filed October 31, 1874. George B. Corkhill, clerk.

140 In the Circuit Court of the United States, for the District of Iowa.

I, George B. Corkhill, clerk of said court for said district, do hereby certify that the above and foregoing transcript contains full, true and complete copies of the praecipe for summons; summons amended and substituted. Petition, cost bond, answer, amended answer, demurrer to answer, replication, bill of exceptions, writ of error, appeal bond and all record entries. Also the original citation, in a certain cause adjudicated in said court, wherein C. W. Upton, assignee in Bankruptcy of the Great Western Insuranee Company, of Chicago, Illinois, was plaintiff, and J. D. Tribilcock was defendant, as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said District, this 23d day of November, A. D., 1874.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. Circuit Court, District of Iowa.

(Indorsement on cover:) Iowa C. C. U. S. No. 780. C. W. Upton, assignee of the Great Western Insurance Company at bankruptcy, plaintiff in error, vs. J. D. Tribilcock. Filed 13th January, 1875.

ARGUMENT FOR PLAINTIFF IN ERROR.

# UNITED STATES SUPREME COURT.

NO. 780.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT, PLAINTIFF IN ERROR,

VS.

J. D. TRIBILCOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

C. C. NOURSE, ATTORNEY FOR PLAINTIFF IN ERROR.

IN THE

# SUPREME COURT

—OF THE—

## UNITED STATES.

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C. W. UPTON, Assignee,
*Plaintiff in Error,*

*vs.*

J. D. TRIBILCOCK,
*Defendant in Error.*

### ARGUMENT IN BEHALF OF THE PLAINTIFF IN ERROR.

#### STATEMENT OF THE CASE.

The plaintiff, C. W. Upton, Assignee in Bankruptcy of the Great Western Insurance Company, brought this suit in the United States Circuit Court for the District of Iowa, against the defendant in error, J. D. Tribilcock, to recover eighty per cent. of one hundred shares, of one hundred dollars each, of the capital stock of said Insurance Company, subscribed for by said defendant.

The defendant became a stockholder of the Great Western Insurance Company by agreeing to take one hundred shares of its capital stock, of one hundred dollars each, in the month of August, 1870, at Bloomfield, in the State of Iowa.

He gave his negotiable note payable to the order of said company, for the sum of two thousand dollars, being twenty per cent. of the amount of the stock subscribed, and executed

a mortgage on real estate in Iowa to secure the same, and afterwards received a certificate of stock for the one hundred shares of one hundred dollars each, upon which certificate was endorsed the words, "non-assessable." The subscription paper upon which defendant subscribed for the stock, contained a provision for the payment of this twenty per cent. in installments, and contained the further provision that the remaining eighty per cent. of the stock should remain on subscription, without interest, until paid by the accumulation of profits on business.

The act of the Legislature of the State of Illinois, incorporating the Great Western Insurance Company, is set out in the record, on pages 26 and 27, and was approved February 4th, 1857. The increase of capital stock, under which defendant subscribed and became a stockholder, was made in pursuance of the general insurance law of the State, which is chapter 53, of Gross' Statutes at Large, of the State of Illinois—page 352. This same general statute exempts the private property of stockholders from liability for corporate debts, but makes all corporators liable to the extent of the amount of stock subscribed. Some time before defendant became a stockholder in the Great Western Insurance Company, the executive committee of the board of directors had a meeting at which they adopted certain resolutions, authorizing and directing certificates of stock to issue of the character and form issued to defendant. These resolutions are set out in full on page 45 of the record.

The principal place of business of the company, was at Chicago, in the State of Illinois, and the company continued to do business after defendant became a stockholder, until the time of the great Chicago fire in October, 1871, when it became insolvent. The stock books of the company were destroyed in this fire, but it was proved that the name of the defendant had been duly entered, about the time of the issuing of the stock to him, as a stockholder of the company, for one

hundred shares of one hundred dollars each. The defendant had retained said certificate of stock in his possession, up to the day of trial, and produced the same upon notice by the plaintiff, whereupon it was given in evidence to the jury.

Plaintiff further proved upon the trial, that the Great Western Insurance Company, in pursuance of the provisions of the statutes of the State of Illinois, made an official report to the Auditor of the said State, on the 31st of December, 1870, showing among other things that the amount of capital stock of the company, then outstanding (in shares of $100 each) was $1,188,000.00, and the amount of unpaid subscribed capital, for which the subscribers or holders were liable, was $965,-168.58, and further proved that the stock subscribed by defendant was computed and counted in making up the amount of capital stock subscribed, and that the eighty per cent. of the stock of defendant was computed in the amount of capital stock unpaid, and shown in said report.

On the 17th of January, 1872, a creditor of said Great Western Insurance Company, filed his petition in bankruptcy against said company, and on the 6th day of February, 1872, said company was adjudicated a bankrupt by the District Court of the United States, for the Northern District of Illinois.

On the 11th of April, 1872, the plaintiff was appointed assignee in bankruptcy of the estate of said Insurance Company, and received a deed of assignment of the estate, funds and property of the company.

On the 5th of July, 1872, upon petition of the assignee in bankruptcy, the said District Court of the United States, for the Northern District of Illinois, sitting in bankruptcy, made an order that the whole amount of capital stock unpaid should be paid to the assignee, on or before the 15th day of August, 1872, and that notice be given to the stockholders of said call.

Notice of this call and demand upon defendant, was proved, as well as the other preliminary steps necessary to a recovery.

All of the questions made in the case arise upon the sufficiency of the defense, and the ruling of the Court, upon instructions asked, and upon exceptions to the charge given to the jury.

The general nature and character of the defense is a claim that the defendant was induced by false and fraudulent representations to become a stockholder in the company.

The alleged fraud claimed by defendant is of two distinct matters. First, of representations or *promises* made by the agent of the company to the defendant as to what would be done with the notes and mortgages given to secure the twenty per cent that he was to pay upon his stock, and: Secondly, representations in regard to the manner in which the remaining eighty per cent was to be paid.

As to the first allegation ; it is claimed that the Insurance Company violated the promise of the agent in that they disposed of the negotiable note and mortgage executed to the company, and that this fact was discovered by the defendant before the insolvency of the company, and an attempt made by the defendant to re-possess himself of the note and mortgage by replevying the same from the bank at Bloomfield, to which the note was sent for collection.

As to the representations made in regard to the eighty per cent of the stock, to-wit : that it should only be paid out of the earnings or dividends, and that it should be "non-assessable," and that the law of Illinois permitted the company to take such contracts of subscription, the record states distinctly that there was no evidence tending to show that the falsity of these representations was discovered by the defendant prior to the insolvency of the company, or that defendant made any inquiry or any attempt to inform himself of the truth of these allegations, or that he ever commenced any proceedings based upon such a claim of fraud to dissolve his contract of subscription, or that he ever tendered back the certificate of stock based upon any

claim that he had been deceived or defrauded with regard to his liability for this eighty per cent.

It appears by the record that the note which the defendant gave for this twenty per cent, and which was secured by a mortgage, was a negotiable promissory note, payable to the order of the Great Western Insurance Company, and the defendant's own witness, Overton, testified that at the time this note was given, all that was said in regard to it was, that the company would consider it as a loan to the defendant and would be indulgent and extend the time of payment unless they needed the proceeds to pay losses. The company had exchanged these notes for other securities in the State of Illinois for the sole reason that the Auditor of that State would not recognize securities out of the State as cash assets, under the requirements of the Insurance law.

After this note had been negotiated to one Waite, by the company, and demand of payment made of the interest thereon from the defendant, the defendant procured it to be transmitted to Bloomfield, to the custody of the First National Bank of Bloomfield, Iowa, for the ostensible purpose of seeing that the payment of interest was credited upon the note when he should pay the same, and upon its arrival he sued out a writ of replevin from the District Court of Davis County, Iowa, to obtain possession of the same, making said bank and its cashier the sole parties defendant to said suit. The petition in replevin is set out in full on pages 37 and 38 of the record.

This petition contains no allegation of any fraudulent repsentations in regard to the eighty per cent of the stock subscribed for by the defendant, and contains no reference whatever to the fact that the defendant still held the certificate of stock for the one hundred shares of stock of said company, and contains no averment that the defendant had rescinded or ever attempted to rescind the contract by which he became a stockholder in said company, and is not in any sense a suit to dissolve or rescind the contract of subscription.

It was simply and purely an attempt to get possession and control of the notes and mortgage upon the allegation that they were improperly negotiated and transferred by the company to a third party, in violation of an agreement alleged to have been made by the agent of the company at the time the note and mortgage were delivered.

Prior to this replevin suit defendant had sent Overton to Chicago, as he claims, for the purpose of demanding possession of the notes and mortgage, and Overton testifies that he did make such demand, based solely on the ground that the notes and mortgage had been transferred in violation of the promise of the agent made at the time they were executed. Overton also testifies that he offered also to rescind the contract and to return the certificate of stock. The plaintiff admits under oath that the certificate was not sent by Overton, and the officers of the company all deny that any such an offer was made. Defendant also testifies that he subsequently made a similar offer to return the stock if they would surrender his notes. This demand was also based solely upon the ground that the negotiation of the notes was wrongful.

It will be sufficient to refer to the other material facts of the case in the argument.

After the evidence was closed plaintiff asked the following instructions from the Court which were severally refused, and the ruling of the Court in refusing the same was duly excepted to.

The plaintiff asked the Court to give the following instructions to the jury :

2d. That any contract between the company or its agents, and the stockholders, limiting their liability as to unpaid instalments of stock is void as to creditors of the company, and as to the rights of the assignee who represents the creditors in this action.

3d. That if the jury find from the evidence that defendant, J. D. Tribilcock, became a stockholder of the Great Western

Insurance Company, in the month of August, 1870, and that he continued to own and hold said stock, until after the insolvency of the company in February, 1872, that any representations by any agent of the company at the time defendant became such stockholder, as to the matter of his liability for 80 per cent. of the stock or any endorsement on the stock of the words "non assessable," are wholly immaterial, and constitute no defense to this action.

4th. That an offer to surrender this certificate of stock by defendant, and a refusal of the officers of the company to accept of such surrender, did not dissolve the relation of defendant as a stockholder in the company.

5th. That if defendant gave to the Insurance Company, or its agent, his negotiable note for 20 per cent of his stock upon a promise or representation of the agent, that said note would be held by the company, and not be sold or assigned, and if the company did violate such promise or understanding, and sold the note or exchanged it for other securities, that such facts alone did not justify a demand of the cancellation of defendant's stock, and his offer to surrender the stock on that ground alone, and upon condition that the notes be delivered up, if proved, constitutes no surrender of the stock, and did not release defendant from his liability as a stockholder of the company to the creditors thereof.

6th. That the action of replevin begun by defendant upon the petition offered in evidence was not a proceeding to cancel his stock, or to dissolve his relation to the company, as a stockholder, and cannot have any such effect in this cause.

7th. That if he, defendant, offered to surrender his stock to the officers of the company, but not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the 80 per cent, but upon another ground, to-wit: that the company had sold and assigned his note and mortgage, then the evidence of such offer to surrender is immaterial, and the evi-

dence of fraud as to such misrepresentations as to his liability for the 80 per cent. can not be made available in this suit, and constitute no defense in this action.

8th. That if the jury find from the evidence that defendant was induced to become a stockholder of the Great Western Insurance Company, in the month of August, 1870, upon representations of the agent of the company, that his stock was non-assessable, and that under the laws of the State of Illinois, the company had a right to make such a contract, and if defendant did not discover that such representations were false until after the insolvency of the company, and a demand on him by the assignee in bankruptcy for the 80 per cent., that such discovery is too late to avail defendant, as against the creditors and the assignee in bankruptcy and proof of such false representations constitutes no defense to this suit.

9th. That if defendant became a stockholder of an insurance company organized under the laws of the State of Illinois, it was his duty to know the effect of his contract and the extent of his legal liability, and he cannot avail himself in this action of his ignorance of the law of Illinois, or that the extent of his liability under that law was misrepresented to him by the agent of the company, to induce him to take stock.

10th. That if you find from the evidence that a copy of the by-laws and charter of the company in printed form was furnished to defendant three or four days before he became a stockholder, and that he became a stockholder without reading them, and relied on a statement of the company's agent that he would not be liable for 80 per cent. of the stock, and that the stock was non-assessable, that defendant is in fault and cannot avail himself of such misrepresentations as against creditors.

11th. That if the jury find from the evidence that the defendant, Tribilcock, became a stockholder of the Great Western Insurance Company, in August, 1870, and that he gave his negotiable note, secured by mortgage, for 20 per cent. of the

stock, and was assured by the agent of the company, at the time he took said stock and gave said note and mortgage, that said note would not be sold or transferred by the company, and that the other 80 per cent. of the stock would remain on subscription to be paid when the profits arising from dividends should be sufficient to pay the same, and that said stock should be non-assessable, and that afterwards the company transferred the note before its maturity, and that defendant ascertained the same and claimed to the officers and agents of the company that they had violated their contract and acted in bad faith with him, in disposing of said note and mortgage, and that he offered to surrender his stock if they would surrender his note, and that the officers and agent of the company refused to accept the stock and surrender the note, and stated they could not do so for the reason they no longer held said notes, and if the jury further find that the untruth of the representations in regard to the non-assessable character of the stock were unknown to the defendant at that time, and that he did not discover that the said representations were untrue until after the bankruptcy of the company and a demand by the assignee for the 80 per cent. in 1873; that in a suit by the assignee in bankruptcy these facts do not constitute a defense to the action for the 80 per cent. of the stock.

12th. That if defendant was induced in August, 1870, to become a stockholder of the Great Western Insurance Company, by a representation of the agent of the company that 80 per cent. of the stock was non-assessable, and that the Laws of the State of Illinois allowed the company to make such contract with those who took stock, then it was the duty of the defendant to use reasonable dilligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject; that if he did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the company in 1872, then he can not, as to the creditors of the company, maintain any de-

fense by means of such representations. The court instructs you as a matter of law, that defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of defendant, that bars such defense as to the assignee.

The court refused each and every of said instructions, to which refusal as to the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th instructions, and each and every of them so refused by the court, the plaintiff in due time and form then and there *excepted.*

Whereupon, the court charged and instructed the jury upon its own motion, as follows, being the only and all the instructions given to the jury:

*Gentlemen of the Jury:*

The Great Western Insurance Company of Chicago failed soon after the great fire of that city, which occurred in October, 1871.

The plaintiff is its assignee in bankruptcy and sues the defendant whom it claims to be the holder of 100 shares of its stock, of $100 each, each for 80 per cent., or $8000.00 remaining unpaid on such stock. The defense in substance is that the defendant was induced to subscribe for the stock by false and fraudulent representations of the agents of the company, who procured the defendant's subscriptions therefor, and that upon the discovery of the fraud the defendant tendered back to the company the certificate of stock he had received, and repudiated the contract, and offered to rescind it. The certificate of stock issued to defendant by the company is as follows:

[Here follows a copy of the certificate of stock as set out on page 40 of printed record.]

The defendant has introduced evidence that a short time before the date of the defendant's said certificate of stock, the

executive committee of the company, according to the minutes of the company, met, and the following proceedings were had by the committee :

(Here follows a copy of the minutes of the executive committee, set out on page 45, of printed record.)

Whether these minutes are authentic, and such resolutions were passed, you are to determine from the evidence.

If you believe from the testimony in this case that soon afterwards the company in Chicago, changed the form of their stock certificates, and got up forms like the one issued to the defendant above mentioned, with the words "non-assessable" conspicuously printed on the end thereof; that the agent of the company solicited the defendant, at Bloomfield, in Iowa, to become a subscriber to the stock of the company; that said agent represented to the defendant, to induce him to subscribe, that he would in no event or in any manner become liable for the 80 per cent.; that that was the meaning and purpose of the words "non-assessable"; that the charter of the company and the laws of the State of Illinois authorized the issue of stock of this character, on which there should be no liability beyond the 20 per cent.; that the company had consulted good lawyers in Chicago, who had given their opinion that the "non-assessable" stock of the company was legal—if such representations were made by the company's agent to the defendant, and if the defendant, believing these representations to be true, thereupon subscribed a paper for 100 shares stock, which, as respects the 80 per cent. now in suit, read as follows: "The balance, 80 per cent., stands on subscription, without in-"terest, until *paid by the accumulation of profits on business*," and if it was part of the contract that when the 20 per cent. were paid up the contract of subscription was to be surrendered to the subscriber and cancelled; then if you find that the defendant relied upon such representations and believed them, and made the subscription and afterwards received the stock certificate upon the faith of such representa-

tions, and upon the belief thereby induced that he would incur in no event any personal liability in respect to this 80 per cent., you are justified, if these facts are proved, in finding that the defendant was induced to become a shareholder in the company, by fraudulent, and deceptive representations, such representations as to the charter of the company, and the laws of another State, aided by the artful and deceptive form of the certificate itself, are of such a character that it can not be said as a matter of law, that the person to whom they were made, had no right to rely upon them. The plaintiff's counsel has not contended before you that the defendant did not make the subscription in consequence of such representations, but he contends that as respects the assignee, who represents the rights of the creditors of the company, there has been no such vigilance on the part of the defendant, in discovering the fraud, and no such steps in repudiating it as to exonerate him from liability to the present plaintiff. Now, I instruct you, that as respects creditors the law requires of one who has been drawn by fraud into the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud ; and on discovering it promptly repudiating the purchase. If you find from the evidence, that within a few months after receiving the stock certificate, the defendant discovering that he had been deceived in some respects, procured the agent who had obtained his subscription, to go to Chicago, delivering to such agent his stock certificate, and instructed the agent to surrender or offer to surrender the stock and demand back the note for the 20 per cent., and if the agent accordingly went to Chicago, and offered to the company to surrender the stock and rescind the contract, which the company refused, and if you find that the defendant never afterwards, at any time acquiesced in being a member of the company. That in September, 1871, he brought an action of replevin for the note, based on the ground of fraud; and if afterwards he refused to receive any dividend on his stock and returned a draft

sent to him by the company, for such dividend, and if all this took place before the bankruptcy or insolvency of the company, I instruct that in point of law this is a sufficient repudiation of the contract to become a stockholder to enable the defendant, living in another State, to resist an action for the payment of the 80 per cent., provided you find that the defendant was induced to become a stockholder by fraud, as before explained ; and also further find, in view of all the circumstances, that the defendant was not unreasonably negligent in discovering the fraud, and that he was guilty of no want of reasonable diligence in taking steps to repudiate the transaction, under the laws of Illinois, there is no *public registry* of the shareholders of such corporations and it is not indispensibly necessary in order to exonerate from liability one who has been defrauded into becoming such stockholder, especially if he live in another State, that he must at his peril discover the fraud, and institute judicial proceedings against the company, to annul the contract before the bankruptcy of the company. If you find that after discovering the fraud, the defendant claims was practiced upon him, he acquiesced therein, and consented to waive the fraud, and determined to abide by the company then the defendant has no defense to this action, for in cases of this kind a man must not play fast and loose ; he cannot say, I will abide by the company if successful, and I will leave the company if it fails ; and therefore, when a misrepresentation is made of which the shareholder has notice, and can take advantage of to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company, or whether he will remain a mem ber."

To this charge and to the various parts thereof plaintiff, at the time, took exceptions, as shown by the bill of exceptions, and for the reasons therein stated, and the jury having under this charge found a verdict for the defendant, the plaintiff

brings the case to this Court on error, and now presents the following:

## Assignment of Errors.

1.

The Court erred in refusing to permit plaintiff to prove by the Secretary of the Company the amount and character of the insurance business done by plaintiff in the years 1870 and 1871, and prior to the great fire.

2.

The Court erred in refusing to give to the jury the 2nd instruction asked by plaintiff above set out.

3.

The Court erred in refusing to give to the jury the 3d instruction asked by plaintiff above set out.

4.

The Court erred in refusing to give to the jury the 4th instruction asked by plaintiff above set out.

5.

The Court erred in refusing to give to the jury the 5th instruction asked by plaintiff above set out.

6.

The Court erred in refusing to give to the jury the 6th instruction asked by plaintiff above set out.

7.

The Court erred in refusing to give to the jury the 7th instruction asked by plaintiff above set out.

8.

The Court erred in refusing to give to the jury the 8th instruction asked by plaintiff above set out.

9.

The Court erred in refusing to give to the jury the 9th instruction asked by plaintiff above set out.

10.

The Court erred in refusing to give to the jury the 10th instruction asked by plaintiff above set out.

11.

The Court erred in refusing to give to the jury the 11th instruction asked by plaintiff above set out.

12.

The Court erred in refusing to give to the jury the 12th instruction asked by plaintiff above set out.

13.

The Court erred in charging the jury in the following language, to-wit :

"If you believe from the testimony in this case that soon "afterwards the company in Chicago changed the form of "stock certificates, and got up forms like the one issued to the "defendant, with the words 'non-assessable' conspicuously "printed on the end thereof; that the agent of the company "solicited the defendant, at Bloomfield, Iowa, to become a "subscriber to the stock of the company; that said agent "represented to the defendant, to induce him to sub-"scribe, that he would in no event or in any manner "become liable for the 80 per cent.; that that was the "meaning and purpose of the words "non-assessable';

"that the charter of the company and the laws of the "State of Illinois authorized the issue of stock of this "character, on which there should be no liability beyond the "20 per cent.; that the company had consulted good lawyers "in Chicago, who had given their opinion that the 'non-asses-"sable' stock of the company was legal, if such representa-"tions were made by the company's agent to the defendant, "and, if the defendant, believing these representations to be "true, thereupon subscribed a paper for 100 shares of stock, "which, as respects the 80 per cent. now in suit reads as fol-"lows: 'The balance, 80 per cent., stands on subscription "without interest until *paid by the accumulation of profits on* "*business*,' and if it was part of the contract that when the "20 per cent were paid up the contract of subscription was to "be surrendered to the subscriber and cancelled; then if you "find that the defendant relied upon such representations, and "believed them, and made the subscription, and afterwards "received the stock certificate upon the faith of such repre-"sentations, and upon the belief thereby induced that he would "incur, in no event, any personal liability in respect to this 80 "per cent., you are justified, if these facts are proved, in find-"ing that the defendant was induced to become a shareholder "in the company by fraudulent and deceptive representations; "such representation as to the charter of the company, and "the laws of another State, aided by the artful and deceptive "form of the certificate itself, are of such a character that it "cannot be said as a matter of law that the person to whom "they were made had no right to rely upon them."

In this portion of the charge there is manifest error in this: That the jury are in effect charged that the alleged false representation, as to the legal effect of the contract entered into, was in law a fraud upon defendant, and that defendant was excused from knowing the law of the corporation of which he desired to secure to himself the benefits, while he

might, by his own ignorance, excuse himself from its burdens and liabilities.

14.

The court erred in instructing the jury in the language following, to-wit :

"Now, I instruct you that as respects creditors, the law "requires of one who has been drawn by fraud into a purchase "of stock that he shall be guilty of no negligence or want of "reasonable care in discovering the fraud, and on discovering "it, promptly repudiating the purchase."

This portion of the charge was erroneous for the reason that there was no evidence tending to show any discovery of the alleged fraud referred to in the portion of the charge above quoted until after the insolvency and bankruptcy of the company, and for the further reason that fraud could not be predicated of the facts upon which said alleged fraud is based, and there was no evidence to which the language thus used was applicable, and its only effect was to mislead the jury ; and for the further reason that under the undisputed testimony in the case the conduct of the defendant was, in law, gross negligence, and upon this point there was nothing for the jury to pass upon ; but under the law, as between the defendant and the creditors and policy holders of the company, he is not in a situation to take advantage of this pretended fraud as defense.

15

The court erred in giving the portion of the charge which reads as follows :

"If you find from the evidence that within a few months "after receiving the stock certificate the defendant, discov- "ering that he had been deceived in some respects, procured "the agent who had obtained his subscription, to go to Chi-

"cago, delivering to such agent his stock certificate, and "instructed the agent to surrender or offer to surrender the "stock, and demand back the note for the 20 per cent., and "that the agent accordingly went to Chicago, and offered to "the company to surrender the stock and rescind the con- "tract, which the company refused, and if you find that the "defendant never afterwards, at any time, acquiesced in being "a member of the company, that in September, 1871, he "brought an action of replevin for the note, based on the "ground of fraud, and if afterwards he refused to receive any "dividend on his stock, and returned a draft sent to him by "the company for such dividend, and if all this took place "before the bankruptcy and insolvency of the company, I "instruct that in point of law this is a sufficient repudiation of "the contract to become a stockholder to enable the defend- "ant, living in another State, to resist an action for the pay- "ment of the other 80 per cent., provided you find the defend- "ant was induced to become a stockholder by fraud, as before "explained, and also further find, in view of all the circum- "stances, that the defendant was not unreasonably negligent "in discovering the fraud, and that he was guilty of no want "of reasonable diligence in taking steps to repudiate the "transaction."

This was error for the reason that said instruction charges the jury in relation to the discovery of fraud, and a repudiation of the contract of subscription based upon the theory that the sale by the company of the negotiable promissory note given by defendant was a fraud, and that the promise of the agent in regard to the non-transfer of the same was a matter upon which the charge of fraud could be predicated, there being no evidence of any action of replevin or repudiation based upon any other ground than that the note and mortgage had been transferred by the company.

The evidence clearly shows when the defendant first dis-

covered or suspected liability, as to the 80 per cent., and that it was long after the insolvency and bankruptcy of the company, and only a short time prior to the commencement of this suit against him.

This part of the charge was also erroneous for the reason that no offer to surrender the stock refused by the officers of the company, could have the effect to dissolve the defendant's relation to the company, as a stockholder as to its creditors.

16.

The Court also erred in giving that part of the charge which states that "under the laws of Illinois, there is no *public registry* of the shareholders of such corporations, and it is not "indispensibly necessary in order to exonerate from liability, "one who has been defrauded into becoming such stockholder, "especially if he lives in another State, that he must at his "peril discover the fraud, and institute judical proceedings "against the company, to annul the contract before the bankruptcy of the company."

In this there is error for the reason that such is not the law, but on the contrary it is essential as between the creditor and the stockholder, that some proceeding should be had to annul the contract, and dissolve the relation of stockholder, where the company refuses to accept of the surrender or to consent to a dissolution of such relation.

Before discussing in detail the particular errors assigned we present to the Court a few general principles applicable to the liability of stockholders in corporations, organized for pecuniary profit, to the creditors of such corporations.

It is a principle, now regarded as elementary, that the capital stock of a corporation is a trust fund for the benefit of the public, who deal with it, and who become its creditors. Upon the organization of any corporation, this capital stock, consisting of paid up and unpaid instalments, is its only source of financial strength, and it is upon this stock alone that its credit is based. It represents all there is of assets of the corporation. Its amount is heralded to the world as the badge of its strength and reliability, and though its stockholders personally may be unknown to the public, yet the public deal with it, and have a right to deal with it, upon the assumption that the stock is held by responsible and solvent individuals, who hold such stock in good faith, and by virtue of valid contracts therefor. It is upon this assumption alone that the corporation can lay any claim to public confidence or trust, and though credit may not be given by the public to particular individual stockholders, it is given to the corporation upon the assumption, that its stock is available for the full amount which the corporation has proclaimed to the world, it has had subscribed. This subject was before this Court, and discussed at considerable length in the case of *Curran vs. the State of Arkansas*, 15 *How.*, 304. See also 2*d Story's Eq. Jur.*, § 1252.

In the case of *Wood v. Dummer*, 3*d Mason*, 308, Judge Story very clearly and positively defines the character of the capital stock of a corporation, and the right of the public to rely upon it. (See page 311.) See also the following authorities. *Angell and Ames on Cor.* (Par. 599 to 604) *Ogilvie v. Knox Ins.*

*Co., et. al., 22 How.* 380-387. *Adler v. Milwaukee &c. Co., et. al.* 13 *Wis.*, 57-60.

"We quote briefly from the opionion in the case last cited. The stockholders being in general free from personal responsibility, the capi- "tal stock constitutes the sole fund to which creditors look for the liquidation "of their demands. *It is the basis of the credit which is extended to the corpora-* "*tion by the public*, and a substitute for the individual liability which exists in "other cases. So far as creditors are concerned, it is regarded in the law as a "trust fund, pledged for the payment of the debts of the corporation. Un- "til they are paid the stockholders are postponed ; they are only entitled to "that which remains after the claims of the creditors are extinguished. This "is as true of the unpaid shares subscribed, or balances due thereon, as of the "amount which has actually been paid in. Such unpaid shares or balances are "as much a part of the capital stock as the sums which have already been "realized thereon. Aside from the funds on hand, they often constitute the re- "source of the company."

See also the late case in this court of *Sawyer vs. Hoag, Assignee, 17 Wall., 610-620*, and the authorities there cited. We quote briefly from the opinion by Mr. Justice Miller, in this case, page 620:

"Though it be a doctrine of modern date, we think it now well established "that the capital stock of a corporation, especially its unpaid subscriptions, is a "trust fund for the benefit of the general creditors of the corporation. And "when we consider the rapid development of corporations as instrumentali- "ties of the commercial and business world in the last few years, with the cor- "responding necessity of adapting legal principles to the new and varying exi- "gencies of this business, it is no solid objection to such a principle that it is "modern, for the occasion for it could not sooner have arisen."

Many other cases might be cited to the same effect.

As a necessary consequence of this doctrine it is also true that no arrangement, agreement, device or artifice between the company and its stockholders, the effect of which is to deprive the creditors of the corporation of the benefit of this fund or any portion of it, is valid as against the creditors, and this doctrine is also well settled upon authority.

*Sawyer vs. Hoag, supra. Slee vs. Bloom, 19 Johns., 477. Mann vs. Cook, 20 Conn., 188. Sagory vs. Dubois, 3d San-*

*ford's Chy., 466, Upton, Assignee, vs. Handsborough, 3d Bissell, 417. Peychand vs. Hood, 23d La. Ann., 732. Adler vs. Milwaukee &c. Co., 13 Wisc., 57. Nathan vs. Whitlock, 9 Paige, 152. Mangles vs. Grand Collier &c., 10 Sim., 519. The Society &c., vs. Abbott, 2d Beavan, 559. Leekes Case, L. R. 11 Eq., 99. In re Disderi & Co., L. R., 11 Eq., 245.*

The Great Western Insurance Company, of Chicago, Illinois, was incorporated in 1857, by special charter from the Legislature of that State. The Legislature of the State of Illinois, in 1869, enacted chapter 53 of the laws of that State, upon the subject of insurance. (See Gross' Illinois Statutes, page 352.)

This was a general act covering the whole subject and applicable to all companies, whether organized before or after its passage. In 1870, by virtue of the authority conferred by the provisions of sec. 18 of this chapter, the Great Western Insurance Company increased its capital stock to $500,000.

Section 21 of chap. 53 (Gross' Stat., p. 357) requires an annual statement from all insurance companies to be made and deposited in the office of the Auditor of Public Accounts, showing a statement of the condition of the company on the 31st of December of each year, of the year preceding. Among other things, this statement must show the capital and assets of the corporation, as also its liabilities, income and expenditures, and where any portion of the capital of any company is composed in whole or in part of notes, this statement must exhibit the amount of notes originally forming the capital, and also state what portion of said notes is still held by the company, and considered capital. Provision is also made by sec. 26 of said act, for the reduction of the capital stock, and prescribes the manner in which it shall be done. And by the same section it is provided that the Auditor shall cause the annual statement of all insurance companies, required to be filed by virtue of the act, to be published in two daily

newspapers of general circulation, the one printed in the city of Chicago, and the other printed in the city of Springfield, and for not less than fifteen days.

The object of these provisions of the statute of the State of Illinois is too obvious to need explanation. It was under these provisions that the state of the capital stock of this company, heretofore set out, was made. The business of fire insurance has become immense. Its public importance is recognized in the fact that, in most of the States of the Union, a special department, having the care and supervision of this subject matter, has been established by legislative enactment. And one of the most important offices in these States is the office charged with the performance of the duties relating to this department.

It has been found necessary for the protection of the public against bogus and irresponsible insurance companies to enact the most stringent provisions concerning them, the ultimate object of which is to protect the public from imposition, and to secure to the policy holder the indemnity for which he contracts. These laws, having for their object the protection of the public, it is to this source that parties dealing with these companies have the right to look in any investigation they may choose to make, as to the responsibility and strength of the companies; and a compliance with these laws being usually a prerequisite to the transaction of the business by the companies, the fact that a company is found transacting business in the usual and ordinary course of affairs, is a fact which justifies the presumption on the part of the public, that these laws have been complied with, and that the necessary amount of capital, and the necessary security required by the laws have been furnished by the company.

In view of these general principles of the law we come to the examination of the defense made in this case, and the charge of the Court in relation thereto, and the instructions asked by plaintiff, and refused by the Court.

It is conceded in the evidence, and the charge of the Court is upon the hypothesis that the defendant in this case had become, and was a stockholder of the Great Western Insurance Company, and held a certificate of stock for 100 shares of one hundred dollars each, and that 80 per cent. of said capital stock of the company was wholly unpaid.

The first answer defendant makes to the creditors of the company, represented in this suit by the assignee in bankruptcy, is that he never intended to pay it, and that he contracted in the beginning that he would not pay it unless the venture proved a profitable one, and it could be realized out of the profits accruing by way of dividends. This he says was his contract with the agent of the company, and that such a contract was authorized by the Executive Committee, and the stock was marked non-assessable, and that it was represented to him, and he believed he had a right to make such a contract.

This transaction of the Executive Committee may have two interpretations. 1st, That all they intended by providing that the stock should be non-assessable was to assure the subscribers that they would cease business whenever their capital became so impaired as to require more than 20 per cent of the stock subscribed, in order to continue business, and that they intended this as a restriction on the power of the board to "assess the stock" beyond that amount. This view of the intention of the Executive Committee is sustained by the language of the stock certificate, and the recitation in their proceedings that 20 per cent. only was all that they believed would ever be required, and that the agents selling stock under the old form of certificates were so representing. The *new* certificate was changed in this important particular, to-wit: it was by its express terms made "subject to the by-laws and charter of the company, and the laws of the State of Illinois." It is hardly to be presumed that such a contingency as the Chicago fire, that rendered bankrupt nearly all the insurance companies doing a considerable business in that city, was

contemplated by these officers of the company. They probably intended only to limit their own power to call for twenty per cent. of the capital stock for the ordinary contingencies of their business, and did not intend an actual fraud upon creditors, in a contingency which they were too sanguine to anticipate, would ever occur in their history. And it was in this sense, no doubt, that they had been advised they had a right to make such a contract. No business man, much less a lawyer, could ever have thought that this scheme of making stock non-assessable, or 80 per cent. of it payable only out of profits, could have ever been a shield against the rights of creditors in case of the insolvency of the company. Another view that may be taken of this scheme to limit their liability is, that they intended a deliberate fraud on creditors, and intended to put all their stock subscriptions in such a shape that if the enterprise proved profitable they could pay up their 80 per cent. with profits, and if it proved unprofitable they could avoid all liability as stockholders.

The defendant in this case is in no different situation from that of any other stockholder, as to this question. There was no false representations of any *fact* made to him. He received just such a contract as he agreed for—as did all the rest. His plea is that he was deceived and misled as to the *legal effect of his contract.* That he became a stockholder in this corporation, but that he did not know what it was in law, to be a stockholder in a corporation. Indeed it is hardly worth so much as this, for he did seem to be aware of the fact that a stockholder was liable for the full amount of the stock subscribed, and hence he attempted to restrict this liability by express contract, and his right to do this was repugnant to his common sense and knowledge of law, and hence he says he relied upon the representation of the agent, that "under the law of the State of Illinois" such a contract could be made, and even this was not clear, but was an assurance based on the opinion of lawyers consulted by the officers of the

company to ascertain whether such a thing might be done or not.

Now the only evidence of fraud in all this matter of representation is, that no such law exists in the State of Illinois or any where else, and that no one who didn't want to be deceived would have courted such deception.

This contract for the stock was made in August, 1870, and the company did not become insolvent until October, 1871. The defendant had entered into a very important contract involving a contingent liability of $8,000, with the extraordinary statement that the law of the State of Illinois, contained some peculiar and extraordinary provisions, by which a man might become the owner of 100 shares of the capital stock of an Insurance Company, and yet never be made liable for more than 20 per cent. of the same. During all these months, with easy access to Chicago, eighteen hours by railroad and daily mail, he *studiously* and *dilligently* makes no enquiry and obtains no information on this important question. Ignorance was bliss, 'twas folly to be wise. By reference to page 55 of the record, it will be seen that on this subject defendant proved as follows: "That defendant was a citizen of Iowa, and was ignorant of the law of Illinois, and of the charter of the company, and he never suspected any liability as to said 80 per cent., or that the said representations, as to the laws of Illinois were false, until the agent of the assignee in bankruptcy, made a demand upon him in the year 1873, * * and that as no claim had ever been made upon him, he never made any investigation, as to the truth of such representations, until after said demand in 1873, and that he relied upon such representations, and was induced thereby to take a large amount of stock."

It further appeared from the evidence, see page 34, folio 80, "that three or four days before defendant agreed to take said stock, Overton, the agent, had left with defendant, a printed copy of the by-laws and articles of incorporation, and that

defendant had not read them." In view of this evidence and this issue, the plaintiff asked the Court to instruct the jury as prayed for in the second, third, eight, ninth, tenth and twelfth instructions, which were as follows :

2d. That any contract between the company or its agents, and the stockholders, limiting their liability as to unpaid instalments of stock is void as to creditors of the company, and as to the rights of the assignee who represents the creditors in this action.

3d. That if the jury find from the evidence that defendant, J. D. Tribilcock, became a stockholder of the Great Western Insurance Company, in the month of August, 1870, and that he continued to own and hold said stock, until after the insolvency of the company in February, 1872, that any representations by any agent of the company at the time defendant became such stockholder, as to the matter of his liability for 80 per cent. of the stock or any endorsement on the stock of the words "non assessable," are wholly immaterial, and constitute no defense to this action.

8th. That if the jury find from the evidence that defendant was induced to become a stockholder of the Great Western Insurance Company, in the month of August, 1870, upon representations of the agent of the company, that his stock was non-assessable, and that under the laws of the State of Illinois, the company had a right to make such a contract, and if defendant did not discover that such representations were false until after the insolvency of the company, and a demand on him by the assignee in bankruptcy for the 80 per cent., that such discovery is too late to avail defendant, as against the creditors and the assignee in bankruptcy and proof of such false representations constitutes no defense to this suit.

9th. That if defendant became a stockholder of an insurance company organized under the laws of the State of Illinois, it was his duty to know the effect of his contract and the extent of his legal liability, and he cannot avail himself in this action of his ignorance of the law of Illinois, or that the extent of his liability under that law was misrepresented to him by the agent of the company, to induce him to take stock.

10th. That if you find from the evidence that a copy of the by-laws and charter of the company in printed form was furnished to defendant three or four days before he became a stockholder, and that he became a stockholder without reading them, and relied on a statement of the company's agent that he would not be liable for 80 per cent. of the stock, and

that the stock was non-assessable, that defendant is in fault and cannot avail himself of such misrepresentations as against creditors.

12th. That if defendant was induced in August, 1870, to become a stockholder of the Great Western Insurance Company, by a representation of the agent of the company that 80 per cent. of the stock was non-assessable, and that the Laws of the State of Illinois allowed the company to make such contract with those who took stock, then it was the duty of the defendant to use reasonable dilligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject; that if he did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the company in 1872, then he can not, as to the creditors of the company, maintain any defense by means of such representations. The court instructs you as a matter of law, that defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of defendant, that bars such defense as to the assignee.

These instructions were each and all refused, and the refusal of each is separately assigned for error.

As expressing an opposite view of the law, the Circuit Court instructed the jury as set forth in that part of his charge contained in the thirteenth assignment of error as follows:

"If you believe from the testimony in this case that soon "afterwards the company in Chicago changed the form of "stock certificates, and got up forms like the one issued to the "defendant, with the words 'non-assessable' conspicuously "printed on the end thereof; that the agent of the company "solicited the defendant, at Bloomfield, Iowa, to become a "subscriber to the stock of the company; that said agent "represented to the defendant, to induce him to sub-"scribe, that he would in no event or in any manner "become liable for the 80 per cent.; that that was the "meaning and purpose of the words "non-assessable'; "that the charter of the company and the laws of the "State of Illinois authorized the issue of stock of this "character, on which there should be no liability beyond the "20 per cent.; that the company had consulted good lawyers "in Chicago, who had given their opinion that the 'non-asses-sable' stock of the company was legal, if such representa-

"tions were made by the company's agent to the defendant, "and, if the defendant, believing these representations to be "true, thereupon subscribed a paper for 100 shares of stock, "which, as respects the 80 per cent. now in suit reads as fol- "lows: 'The balance, 80 per cent., stands on subscription "without interest until *paid by the accumulation of profits on "business*,' and if it was part of the contract that when the "20 per cent were paid up the contract of subscription was to "be surrendered to the subscriber and cancelled; then if you "find that the defendant relied upon such representations, and "believed them, and made the subscription, and afterwards "received the stock certificate upon the faith of such repre- "sentations, and upon the belief thereby induced that he would "incur, in no event, any personal liability in respect to this 80 "per cent., you are justified, if these facts are proved, in find- "ing that the defendant was induced to become a shareholder "in the company by fraudulent and deceptive representations; "such representation as to the charter of the company, and "the laws of another State, aided by the artful and deceptive "form of the certificate itself, are of such a character that it "cannot be said as a matter of law that the person to whom "they were made had no right to rely upon them."

This presents the first and most important question of law in this case, to-wit: whether a misrepresentation to one who is about to become a stockholder in a corporation for pecuniary profit, as to the legal effect of his contract, is a fraud in law that will avoid the contract as to creditors after the insolvency of the company.

A decision of this question in the affirmative is fraught with such manifold and manifest mischief that we can hardly presume that this court will seriously entertain the proposition.

The attempt of a stockholder, by any means whatever, to limit his liability for the full amount of his stock, is at once a fraud upon the law and upon the fund the law has provided for the security of the creditor. Because he has attempted to commit such a fraud is he to excuse it by showing that he was sincere in the belief that he could accomplish it? or that he was induced to believe it by the false hopes held out to him by others who had confederated together to accomplish the

same thing? Such a doctrine is at once to open the door to gross frauds and impositions, and to destroy the moral character of corporate bodies, and to render them odious to the public.

It is a well settled principle of law "that a misrepresentation as to the legal effect of a written agreement which a party signs with a full knowledge of its contents is not a sufficient ground at law for avoiding the agreement." Kerr on Fraud and Mistake, p. 90.

In the case of *Platt vs. Scott, 6 Blackford, 389*, it is held "that it is considered that every person is acquainted with the law, both civil and criminal, and therefore no one can complain of the misrepresentations of another respecting it."

So in the case of *Russell vs. Branham, 8 Blackford, 277*; it is held "that a party is not responsible for a misrepresentation, as to the legal effect of a contract."

So in the case of *Starr and others vs. Bennett, 5 Hill, 303*, an action was brought against a Deputy Sheriff, for a wilful misrepresentation, that a certain return made by him, was in due form of law, and it was held on demurrer to the declaration, that an action for deceit would not lie against him, inasmuch as the inquiry related merely to his *opinion* upon a question of *law*.

So in the case of *Fish vs. Cleland and wife, 33 Illinois, 238*, it is held that,

"A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely, and if he does so it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."

To the same effect are the following cases: *Clenun vs. New Dan. R. R. Co., 9 Ind., 488; Morton vs. Wheaton, 38 Ala., 637*.

And let it be remembered that the above cases relate to the question of relief as against the party who made the false rep-

resentation. Here the question arises not between the Insurance Company and the stockholder, but it is a question between the stockholder and the creditors of the company. The question is whether the stockholder shall plead his own ignorance of the law, under and by virtue of which he sought to acquire special rights, privileges. and exemptions, and be thereby permitted to commit a fraud upon innocent creditors, who insured their property upon the faith of the capital stock subscribed. Upon the proposition that this is a suit for the benefit of the creditors, and that the assignee in bankruptcy represents the creditors and their rights, it is only necessary to cite the case of *Sawyer vs. Hoag, assignee, 17 Wallace, 619*, recently decided by this court.

In the case of *Litchfield Bank vs. Church, 29 Conn., 137*, the distinction we here make as to the rights of the creditors, as against a stockholder who claims to be relieved from his contract on the ground of fraud, is fully recognized.

It is held in that case, that though the bank was fraudulently gotten up, and defendant was induced to subscribe for stock upon the representation that his subscription would be merely nominal, yet defendant could not, as against the receiver of the bank, avail himself in his defense of the fraudulent character of the bank, or of the misrepresentations under which he had been induced to subscribe for the stock. Ellsworth, J., in delivering the opinion of the court, says (page 150):

> It was said, in the language of defendant's notice, that the bank was a fraudulent and bogus concern, from the beginning intended and calculated to deceive and defraud whoever might be drawn in to make contracts with it; that its pretended organization and all its transactions were fraudulent and illegal. We believe this statement to be substantially correct. Who, we ask, is the bank that has done this, and who ought to bear the loss of such frauds? The creditors of the bank (represented here by these receivers) who have been induced to trust the bank as a legal and upright institution, or the stockholders who held themselves out as constituting the bank, and who were recognized and adjudged to be so by the commissioners? There can be but one answer to these questions.

Upon the very facts of the case now before the court we

have the opinion of Judge Hopkins, of the Seventh Circuit, reported in 3 Bissell Circuit Court Reports, page 417, *Upton assignee, vs. Hansborough.* In that case these very resolutions were before the Court, and the same plea that the stock was non-assessable was set up. The Court says:

> The defendant for a further defense gave in evidence a resolution passed by the board of directors some time in the year 1870, releasing its stockholders from the payment of the eighty per cent. unpaid upon their stock, and after that issued certificates stamped "non-assessable." The certificates upon their face, however, stated that only twenty per cent. had been paid, and the balance was subject to call in the manner hereinbefore stated. This resolution was not communicated to the public, but only to the stock agents and persons employed in disposing of the stock. The officers, in their report to the State Auditor, showing the condition of the company as required by the statute, made no reference to such a resolution, but stated in their report of December, 1870, that there was eighty per cent. unpaid upon its stock, and made no exception as to the stock issued after the passing of that resolution. I ruled on the trial that that resolution, if valid, virtually reduced the capital of the company four-fifths, and that it was not binding upon parties who had insured without knowledge of its existence. Its object manifestly was to enable the stockholders to enjoy the profits of the business if successful, and avoid liability if unsuccesful, casting the hazards wholly upon the creditors, and that as to creditors it was void. Subsequent reflection has confirmed my impression upon that point. To sustain it as against the creditors would be against the fundamental principles of law and justice, and without hesitation I pronounce it legally fraudulent and utterly inoperative.

If it was *unlawful* as to creditors that defendant should make a contract limiting his liability as a stockholder, can it be possible that he can accomplish the same thing by pleading that it was fraudulently represented to him that he could do so, and that he attempted it for that reason. How does it answer the public policy, which is to secure creditors, to say that those stockholders who were induced to believe they had a right to make such a contract, shall escape liability, and those only shall be held who did not believe they could do so. Is the security of the creditors to depend upon the *intelligent dishonesty* of stockholders, and is ignorant credulity a bar to their rights.

This is an issue upon which the creditors are powerless. It is a simple thing for a man to swear he made the contract in good faith, believing he could exempt himself from all liability, and that it was so represented to him? And how is such evidence to be rebutted? If the law requiring stockholders to pay for their stock, and to furnish the amount of capital they subscribe, can be thus easily avoided, and creditors have only to look to the intelligent dishonest men in the organization for their security, and all the honest ones are to escape through ignorance, then are we in a straight truly, for it is hardly to be supposed that under such circumstances the dishonest ones will not by perjury, also establish their innocence. In addititon to the cases already cited on this proposition we cite the court to the additional case of *Sturges vs. Stetson, 1 Bissell, C. C. R., 146.*

The Circuit Court having refused the second, third, eighth and ninth instructions asked by plaintiff, each of which embrace this proposition, proceeds to tell the jury in terms, "that if they find from the evidence that defendant relied upon such representations, and believed them, you are justified in finding that the defendant was induced to become a shareholder in the company by fraudulent and deceptive representations," and that "such representations as to the charter of the company, and the laws of *another* State, aided by the artful and deceptive form of the certificate itself, are of such a character that it cannot be said as a matter of law, that the person to whom they were made, had no right to rely upon them."

Reliance seems to be placed here upon the absurd proposition that the representations were made concerning the *laws of another State.* That Tribilcock was a citizen of Iowa, and that these representations relate to the charter of the company, and the law of the State of Illinois. Aside from the consideration that a printed copy of the charter of the company was in Tribilcock's possession three or four days before he became a stockholder, and that he did not choose to read

it, and that the Court seems carefully to have ignored that fact in its charge, and refused to instruct the jury in relation thereto, as asked in the tenth instruction prayed for, yet we think it is a sufficient answer to this proposition to say that defendant cannot, in the very act of becoming a stockholder in a corporation organized under the law of Illinois claim that he was ignorant of the duties and liabilities, it imposed upon him. He was seeking to avail himself of certain special privileges and immunities conferred by the laws of that State upon persons associating themselves together as a body corporate under its laws. It was not as to him, and the rights and privileges he sought to avail himself of, the law of a foreign State. He sought to do business in that State, to become a citizen of that State for a special purpose, and to secure a special advantage which, as a natural person, he could not otherwise obtain.

In the case of *Marshall vs. B. & O. R. R. Co., 16 Howard, 328*, this Court says :

"This corporation can have no legal existence out of the bounds of the sovereignty by which it is created. The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary habitat of the corporation, and where alone they can be made subject to suit, and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there."

It is true that this language is used by the Court with reference to the right of the citizens of another State to maintain a suit against a corporation within the State where it is organized. But for a much stronger reason should this rule be applied to the question of rights and liablities, if applicable merely to remedies. Is it possible that a member of a body corporate is to plead ignorance of the very law of its being, that he may claim that because he is a citizen of another State that he is a stranger to the very compact that he voluntarily enters into for his own pecuniary profit and advantage?

In the case of *Payson, Assignee, vs. Withers*, decided at May term of the Circuit Court for the District of Indiana, Judge

Hopkins had occasion to decide this very question, and uses the following language :

"It will not do, when a citizen subscribes to the capital stock of a foreign "corporation, to say that he was ignorant of the terms of the act which created "the corporation. He is presumed to know what those terms are. They are "created by the law of another State. And he, for the purpose of assuming "his obligation, in a certain sense, goes into another State and casts off, for the "time, the vesture which his own State throws around him, and puts on that "of another State, and is bound by the obligations which the legislature of an- "other State has imposed upon the corporation, and the privileges which it has "granted, and the terms and conditions of the grant. All these he is pre- "sumed to know just as much as when he makes any contract to be executed "by him in another State. * * The well known maxim of course applies to "him in this case, just as it does to any law of Indiana (his own State), that "ignorance of the law does not excuse him."

The foregoing opinion has not yet been officially reported, but is referred to in a foot-note to the case in 3 Bissell, before referred to, and the reporter promises the opinion in full in 4 Bissell, when published.

We come next to the consideration of the question so unfortunately ignored in the charge of the Circuit Court, to-wit : If this contract was voidable on account of these representations as to the liability of the stockholder, was there ever any thing done by defendant prior to the insolvency of the company upon which the defendant could claim his exemption.

And here we refer the Court again to the record : The record is clear and unequivocal as to the fact that up to the time of the demand by the assignee in 1873 the defendant had never so much as suspected his liability for this 80 per cent., and had never made any investigation whatever, of the truth or falsity of the representations in relation thereto, and upon which he now seeks to avoid his contract.

The Court had, previously, upon a ruling on demurer in this class of cases, held that *this very plea of fraud*, without an allegation of a surrender or attempt at surrender, prior to the insolvency of the company was insufficient, and did not constitute

a defense to the action. The Court *then* held: "Upon consideration of the adjudged cases, and upon principle, our judgment is that a contract to purchase shares induced by fraudulent representations or concealment is *not void*, but only voidable, which means as the House of Lords has decided that it is valid until disaffirmed, and not that it is void until affirmed," and cites *Oakes vs. Turquand, 2 H. L., 325, 344, 1867.*

In the same opinion the Court further says:

"If a person has accepted a certificate of stock and becomes to all external appearance a stockholder, persons may have become creditors of the company on the faith of his membership, and in law are presumed to do so, and as they cannot know the manner in which he was induced to become a stockholder there is grounds to maintain *that as to them it is immaterial;*"

and the opinion concludes:

"That the plea was defective in that it did not show that the defendant made use of reasonable diligence to make himself acquainted with the *matters of fact in respect to which the fraud is claimed, nor when nor how he repudiated the contract*, nor whether he offered to surrender the certificate of stock promptly on discovery of *the* fraud."

This opinion is reported in the *Western Jurist*, vol. 8, No. 6, June, 1874, page 351.

Now, upon the trial of the cause, when it was proved that *no diligence* was ever used by defendant to ascertain whether the law of Illinois sanctioned such a contract, and no discovery was ever made that it could not be done until long after the insolvency of the company, and what does this same court say to the Jury. We quote from his charge:

"If you find the defendant discovered that he had been deceived in *some respects*, procured an agent to go to Chicago, and offered back the stock," &c.

Now if the Court will look at the bill of exceptions, page 36, folio 88, it recites that the demand and offer to return the stock was based *solely* on what was represented should be done with the notes and mortgage given for the 20 per cent. The

Circuit Court, in its charge to the jury, does not even pretend that any fraud could be predicated upon the evidence relating to the note and mortgage. Whilst he refused to charge as asked by the plaintiff on that question, he nowhere tells the jury that a violation by the directors of the promise of the agent that a negotiable note should not be transferred, was a fraud upon defendant, by reason of which defendant might avoid the contract. Judge Dillon is too good a lawyer to put such a proposition on paper, and yet this is the *only*, "some respects," that was ever discovered by defendant, and upon which he ever claimed the right to recind the contract. In all of this charge to the jury the talk about fraud is based solely upon the allegations and proof relating to the stock being non-assessable, and the law of Illinois being misrepresented to the defendant upon that question. But in view of the fact that this pretended fraud was never discovered, and no repudiation of the contract, and no claim to rescind it had ever been based upon such a ground, the Court saw proper under this phrase of "some respects" to tell the jury that the offer to recind the contract on the ground that defendants negotiable note had been disposed of by the directors in violation of the promise of the agent, was a sufficient repudiation of his relation as a stockholder of the company, and though the fraud committed was of other matters not discovered until after bankruptcy, they might couple the two together and find a verdict for the defendant.

And yet this very phrase, "some respects," is put into the charge of the Court in a position where it is most unfortunate. The Court says "I instruct you, that as respects creditors, the law requires of one who has been drawn by fraud, into the purchase of stock, that he be guilty of no negligence or want of reasonable care in discovering the fraud, and on discovering it promptly repudiating the purchase." The court has here reference to the representations in regard to the "non-assessable" character of the stock, and the law of Illinois. Indeed

he has just said to the jury that plaintiff's counsel has not contended that the defendant did not make that subscription in consequence of such representations, and now, immediately following this, he makes a discovery by defendant that he had been deceived about the negotiation of his notes, a sufficient ground of diligence in discovering the fraud based upon the charge relating to the non-payment of the 80 per cent.

We call particular attention of the Court to the extraordinary character of this charge. In the same connection that the Court calls the attention of the jury to our claim, that no diligence had been used and no discovery of *the fraud* had been made until after insolvency, the Court avoids the whole force of our position, by telling the jury that a discovery of another matter, and an offer to rescind based on another matter will excuse the defendant.

Now in order to fully meet this error of the Court, the plaintiff's counsel asked the seventh instruction as follows:

7. "That if he, defendant, offered to surrender his stock to the officers of the company, but not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the 80 per cent., but upon another ground, to-wit: that the company had sold and assigned his note and mortgages, then the evidence of such offer to surrender is immaterial, and the evidence of fraud as to such misrepresentations as to his liability for the 80 per cent. can not be made available in this suit, and constitute no defense in this action."

Which the Court refused, see page 42 of record; and plaintiff further excepted to that portion of the charge, after setting it forth specifically as follows:

"The exception is for the reason that said instruction charges the jury in relation to the discovery of fraud, and a repudiation of the contract of subscription based upon the theory that the sale by the company of the negotiable promissory note given by defendant was a fraud, and that the promise of the agent in regard to the non-transfer of the same was a matter upon which the charge of fraud could be predicted, there being no evidence of any action of replevin or repudiation based upon any other ground than that the note and mortgage

had been transferred by the company. That the evidence clearly shows, and there was no conflict of evidence upon the question as to when the defendant discovered or suspected any liability as to the 80 per cent. and that it was long after the insolvency of the company."

We hardly know how to argue a proposition so self evident, that an attempt to repudiate or rescind this contract of subscription upon *one* ground, and to establish a fraud upon another and distinct ground, not discovered or claimed at the time of the attempted repudiation, cannot be made available as a defense.

Nowhere in this charge of the Court is any other *fraud* mentioned than the undiscovered one. Nowhere in the charge of the Court is the attention of the jury directed to the question as to whether defendant did or did not rely on the promise of the agent that the note and mortgage should not be transferred. Nowhere are the jury told that they must find that these promises relating to the non-transfer of the note and mortgage formed any part of the inducement to become a shareholder. On the contrary the stock was subscribed for on written conditions for the absolute payment of this 20 per cent. in instalments of five per cent cash, and the remainder of the 20 per cent. in three, six and nine months. The note and mortgage were given as a substitute for the cash payments, and the conversation with the agent about the company holding it was after the relation of stockholder had been created, and the agreement to take the shares had been completed. It was this subsequent contract that defendant claims had been violated that constituted solely the "some respects" upon which defendant claimed he had been deceived, and upon which alone he claims to have offered back his stock. The jury have not, in their verdict found, and under the charge of the court were not required to find that this "some respects" was a fraud, or that it was any part of the original contract by which defendant became a stockholder. On the contrary their attention is directed solely to the question as to the representations

made in regard to the 80 per cent., and the non-assessable character of the stock and the law of Illinois, and they are told that if they find *these* to have been the inducement to the contract, and the "some respects" to have been the ground upon which the offer to rescind was based, that it was a sufficient defense.

On this point we need cite a single authority only.

We call attention to Wright's case, Law Reports, 12 Eq., 331.

It will be seen from an examination of this case that Mr. Wright actually secured the cancellation of the allotment of shares originally subscribed by him upon the books of the company before its insolvency, and there had been entered opposite his name, "money returned and allotment cancelled." He had been deceived by the prospectus of the company, and the representations in it contained at the time he subscribed, but the cancellation was not based upon this fraud, but upon another ground—Mr. Wright not actually discovering the falsity of the representations contained in the prospectus until after the insolvency of the company. It was held by the Court, that inasmuch as the allotment of shares was cancelled upon another ground, and upon grounds which did not warrant the cancellation, that Mr. Wright was liable as a shareholder, even though he may have had the right, had he known of the fraud that had been practiced upon him, to have disaffirmed and annulled the contract upon that ground, and to have brought his action therefor. And it was held that it lay upon him to show that a concluded election to have his allotment cancelled on the ground of these misrepresentations, was made by him before the insolvency of the company, by bill filed for that purpose, and that if no such election was, in fact, made by him, his ignorance up to the time of the insolvency of the company of his rights in this respect did not help him.

We come now to the discussion of these "some respects" upon which the offer to rescind was made. Waiving, for

the time being, the question whether or not a mere offer to rescind had the effect to dissolve defendant's relation as a stock holder, we proceed to discuss the question whether or not the offer to rescind, if made, was based upon any claim which would have justified the officers in accepting the surrender of the stock. The bill of exceptions recites "that the demand (for the possession of the notes and mortgage) was based *solely* on what was represented as to what should be done with the notes and mortgage, and the establishment of the branch, which were claimed by the defendant to have been fraudulent." It is sufficient to say in regard to the establishment of the branch, that the "answer makes no issue of fraud, on that question, and no evidence was given upon it, except that the branch was established, and no notice is taken of it in the bill of exceptions. It was for the defendant to allege and prove a *fraud*, and an offer to rescind because of *that fraud*." And we here take the position that as between Tribilcock and the company, there was nothing in all this transaction relating to the notes and mortgage, that gave Tribilcock the right to demand possession of the same or to rescind his contract of subscription because the company refused to deliver to him said papers. On this point we asked the Court to instruct the jury :

5th. "That if defendant gave to the Insurance Company, or its agent, his negotiable note for 20 per cent. of his stock upon a promise or representation of the agent, that said note would be held by the company, and not sold or assigned, and if the company did violate such promise or understanding, and sold the note or exchanged it for other securities, that such facts alone did not justify a demand of the cancellation of defendant's stock, and his offer to surrender the stock on that ground alone, and upon conditions that the notes be delivered up, if proved, constitutes no surrender of the stock, and did not release defendant from his liability as a stockholder of the company to the creditors thereof.

6th. That the action of replevin begun by defendant upon the petition offered in evidence was not a proceeding to cancel his stock, or to dissolve his relation to the company, as a stockholder, and cannot have such effect in this cause."

made in regard to the 80 per cent., and the non-assessable character of the stock and the law of Illinois, and they are told that if they find *these* to have been the inducement to the contract, and the "some respects" to have been the ground upon which the offer to rescind was based, that it was a sufficient defense.

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6th. That the action of replevin begun by defendant upon the petition offered in evidence was not a proceeding to cancel his stock, or to dissolve his relation to the company, as a stockholder, and cannot have such effect in this cause."

Which instructions were refused, and the "some respects" clause of the charge of the Court before referred to was given in lieu thereof Now what are the facts claimed ?

The defendant, in payment of this 20 per cent. of capital stock, executed his negotiable promissory note, making it payable to the *order* of the Great Western Insurance Company. In the face of this written undertaking he says that it was represented that this note would be left with and remain under the control of the Bloomfield Branch ; that it would be collected only as needed to pay losses, and that it should not be sold and transferred by the company.

We have, in this negotiable instrument, first, a covenant to *pay*, absolutely ; and second, a covenant equally solemn in character, to pay to whomsoever the "Great Western Insurance Company"—not the "Bloomfield Branch"—may *order*.

The so-called fraudulent representations are totally at variance with the terms of the obligation. But again ; they relate wholly to what was to be *thereafter* done with the notes, and to the future course of the payee with reference to them, and hence are not false statements or representations as to an *existing* fact ; but only promises or undertakings as to the *future* Fraud cannot be predicated of such matters. That there may be no misapprehension as to the ground covered by the evidence upon this point, we again quote from the bill of exceptions all that the evidence tended to show upon that point :

"Evidence was given tending to show that the agent, Overton, to induce "defendant to subscribe, represented to defendant, when the note and mortgage "were given, that said note and mortgage should remain at Bloomfield, under "the sole control of the officers of the Branch at Bloomfield, which said agent "represented would be established there, and would be collected only as they "needed the same to pay losses, and that the company would not sell or trans- "fer them, or remove them from the Bloomfield Branch. Defendant intro- "duced Overton, who testified on cross-examination that he did not repre- "sent that the note and mortgage would remain at Bloomfield, under the con- "trol of the officers of the Branch, but that he did represent that the company "would treat it as for a loan of money to defendant, and that the company "would extend the time of payment until they needed the money, and that the "company would not sell or transfer the note and mortgage."

We have first a representation that the note and mortgage should remain at Bloomfield, under the sole control of the officers of the Branch at that point—a representation, as we have just seen, not only at variance with the terms of the instrument, but of a matter relating to the future custody and control of the paper, and the conduct of the payee with respect to it. Second, we have a representation that the note would be collected only as needed to pay losses; and thirdly, that the company would not sell or transfer the note; each of which are of the same character in both respects as the first.

Can it now be said that if the company should not allow the note and mortgage to remain at the Bloomfield Branch, or should demand payment of it when due, according to its terms, or should sell and transfer the note, that the validity of the contract of subscription could be assailed as fraudulent, and that the stockholder would thereupon become entitled to dissolve his relation to the company as a stockholder. There can be but one answer to this question.

If it be necessary to cite authorities upon so plain a proposition, we refer the Court to the following: The case of *Groves vs. Hodges, 55 Penn., 518*, was a suit involving an agreement to dig iron ore on certain lands, and it was claimed that the agreement was fraudulent and void, because that, at the time of its execution, and during the negotiation it was represented that Irwin intended to put up a furnace in one or two years. The Court says:

"It would be going very far to hold that a man may be relieved from his deed by proof that when it was made, promises were held out to him that were not performed. Fraud avoids all contracts, but fraud consists in false representations of existing facts, which are not such, or in deceitful concealment of facts, neither of which is found in the evidence. But a promise is not in itself a false and deceitful representation."

So in the case of *Farrar vs. Bridges, 3 Hump, 566*, it is held that,

"Mere non-compliance with the terms of a contract in not paying a consideration agreed to be paid, is not such a fraud as will authorize a Court of Chancery to cancel the contract."

Certainly the transfer of this note did not render it void. Concede for the sake of argument that its transfer by the company was a violation of a valid promise based upon a new and proper consideration. What then? Could defendant rescind his contract? Had he a right to the possession of the note and mortgage? Did a transfer of it operate as a payment or satisfaction of it. Suppose he had a right to have the note and mortgage returned to the officers of the Bloomfield Branch, or to any damages he might have suffered if it was not so returned, certainly he had no right to have the note cancelled, or to have his contract of subscription set aside.

And right here we call the attention of the Court to the fact that the offer to surrender up this certificate of stock (which strange to say was never sent to Chicago at all,) was upon the *express condition*, that the officers of the company would deliver up to the defendant as paid or cancelled this note and mortgage. There never was any attempt to surrender unconditionally; it was based upon a condition that defendant was aware at the time the officers could not comply with. He never said, here is the stock. I will no longer be a stockholder. I will treat my mortgage and note as void, and take the risk of liability upon it. Nothing of the kind. He says, give me up my note and mortgage, and I will surrender the stock. The offcers say, this is impossible, we have parted with the possession. What does the defendant then reply? We say in effect, he says, "then I will keep my stock until I find out what I can do about this note. We call attention here to defendant's own amended answer upon this point, page 20, folio 47. After reciting that the officers refused to take any action in the matter whatever, he says he "took legal advice of those whom he supposed ought to know, and that he was advised that he would not be liable except on his note, and that under the circumstances he would not be liable on said note, except it got into the hands of an innocent holder, and that the officers of the company told him

that was all he would be liable for, and that he never knew or suspected anything else until after it was too late to procure or attempt to procure a recission of said contract, and a surrender of said certificate on account of said last named fraud." Here we have the distinct averment in his own answer that he still expected to have this note to pay, and all he expected to pay—and that he retained the certificate and never made any other or further attempt to surrender it, because he thought at most this 20 per cent. was all he had to pay.

As to the action of replevin, it will be seen that no reference is made in that petition to the fact that defendant had subscribed for 100 shares of stock, or that he held the certificates for that amount of stock at all. The action was not against the company at all, nor against the owner or holder of the note, and nothing is said about having surrendered or having offered to surrender the stock. The subject is carefully not alluded to in that suit, yet the Court refuses to instruct the jury that this action of replevin was not a surrender or cancellation of the stock, but in effect tells the jury that it was such.

If this offer to rescind the contract, and to surrender the stock, was not based upon a legal and rightful ground, the officers of the company did right in "doing nothing about it," and defendant could claim nothing from it; and the Court refused to present this question to the jury. Nowhere in the charge does the Court say to them that these facts, if true, constitute fraud, or that they are to find, or enquire whether it formed any part of the inducement to the contract.

We asked the Court also to give on this subject the 11th instruction, which was as follows:

11th. That if the jury find from the evidence that the defendant, Tribilcock, become a stockholder of the Great Western Insurance Company, in August, 1870, and that he gave his negotiable note, secured by mortgage, for 20 per cent. of the stock, and was assured by the agent of the company at the time he took said stock and gave said note and mortgage, that said note would not be sold or transferred by the company, and that the other 80 per cent. of the stock would re-

main on subscription to be paid when the profits arising from dividends should be sufficient to pay the same, and that said stock should be non-assessable, and that afterwards defendant ascertained the same and claimed to the officers and agents of the company that they had violated their contract and acted in bad faith with him, in disposing of said note and mortgage, and that he offered to surrender his stock if they would surrender his note, and that the officers and agent of the company refused to accept the stock and surrender the note, and stated they could not do so for the reason they no longer held said notes, and if the jury further find that the untruth of the representations in regard to the non-assessable character of the stock were unknown to the defendant at that time, and he did not discover that the said representations were untrue until after the bankruptcy of the company and a demand by the assignee for the 80 per cent. in 1873 ; that in a suit by the assignee in bankruptcy, these facts do not constitute a defense to the action for the 80 per cent. of the stock.

This also was refused.

We come now to discuss the further question embraced in the 4th instruction asked by plaintiff and refused by the court, to-wit :

4th. That an offer to surrender this certificate of stock by defendant, and a refusal of the officers of the company to accept of such surrender did not dissolve the relation of defendant as a stockholder in the company.

Instead of this the court instructed the jury as follows :

That under the laws of Illinois, there is no *public registry* of the shareholders of such corporations, and it is not indispensibly necessary, in order to exonerate from liability one who has been defrauded into becoming such stockholder, especially if he lives in another State, that he must, at his peril discover the fraud, and institute judicial proceedings against the company, to annul the contract before the bankruptcy of the company.

And to the part of the charge embraced in the bill of exceptions, folios 128, and 129, and 130, which recites this offer to surrender, and instructs the jury that in point of law the defendant was guilty of no want of reasonable diligence to repudiate the transaction, the bill of exceptions recites that

Plaintiff also excepted to that part of the charge, for the reason that no offer to surrender the stock refused by the officers of the company could have the effect to dissolve defendant's relation to the company, as a stockholder.

And this brings us to the very question of playing fast and loose on the chances of profit and loss in the transaction.

We present here the facts of the case briefly in this connection. Defendant's name had been duly entered upon the stock books of the company and his unpaid stock reported to the Auditor of State of the State of Illinois, as a part of the assets of said company, upon the faith of which the company obtained credit. The proof of the extent of this credit the court, for some reason, refused to permit plaintiff to prove. We presume it was upon the ground, assumed by the court in the ruling upon the demurrer, that the creditors are presumed to have contracted with reference to these stock subscriptions, and that the extent of the business done was wholly immaterial. A further ground upon which this evidence might be held immaterial was the fact that the adjudication of the Bankrupt court showed the liabilities of the company conclusively. We insist that a mere offer to surrender to the company, it refusing to recognize the right to surrender, or denying the existence of any grounds therefor, does not dissolve such relation. How are the creditors to know of such a transaction? Again: is it true that this offer to surrender, rejected by the company, deprives the stockholder of his right to dividends? He may at any time after the offer say to the company that although he offered to surrender, the company refused to act upon the offer, but persisted in regarding him as a stockholder. The court will look in vain through this whole record to find the existence of any act on the part of defendant which as to him dissolved, *ipso facto*, his relation to this company as one of its stockholders. He still held his certificate of stock. He was still liable on his notes and mortgage for 20 per cent. to the purchase thereof.

His action of replevin had determined nothing as to his

liability to Waite. There is nothing in the record showing that Waite was a party, or had any notice of that proceeding. The mere possession of the note and mortgage determined nothing. Waite's right in a court of equity to foreclose the mortgage was not impaired by the commencement of that suit, and the commencement of the suit was all the proof defendant made on the subject.

We find that several months after defendant's alleged offer to surrender his stock a draft was sent to defendant for his dividends on the stock. Instead of refusing it, he receives it, and retains it for several weeks for the pretended purpose of consulting with counsel in the matter "to ascertain his legal rights." He retains possession of it until the 25th of September, 1871, and then, only thirteen days prior to the happening of the event which made the company bankrupt, he hands it to Overton, the Secretary of the Bloomfield branch. An act prompted in fact by the fear that the retention of the draft for the dividend would compromise his position in the suit which he instituted on the *very day* he returned the draft, against the bank at Bloomfield, and its cashier, to get possession of the note which, as he had learned the February previous, had been sold and transferred by the company to another party, who had forwarded it to this bank for collection of interest due upon it. Clearly the relations existing between the company and the defendant at the time he received this dividend were such as that the defendant might legally have retained it, notwithstanding his pretended offer to surrender to the company made months previous to that time. Not only so, but even after the refusal to receive a dividend if the company does no act recognizing a discontinuance of the relation of stockholder, but persists in so regarding him, he would have the legal right to elect to continue in such relation, and receive dividends on his stock. It is clear that, so long as he is in a position, where he can compel payment to him by the company, of dividends, he may, by the *creditors* of the com-

pany, be compelled to pay in his unpaid stock. Whatever may be the rule as to disaffirmance of voidable contracts as between individuals, the interests of the public require that something more than a mere offer to surrender stock in an incorporated company should be requisite to a dissolution of the relation, and the withdrawal from the corporation and its creditors, of any portion of the fund pledged to them in payment of their claims. The course of the English decisions shows very clearly that a bill should be filed for the purpose of annulling the contract of subscription, and removing the name of the stockholder from the books of the company. A similar course ought to be pursued here. We do not say that when the company concedes in good faith the *right* to disaffirm and surrender, that a bill need be filed, but we do say that in all cases, when the company refuses to accept of the surrender of the stock, and persists in holding out the party as a stockholder upon the books of the company, and by embracing his stock in its reported amount of subscribed capital, or in short, whenever the company refuse to recognize a discontinuance of the relation of stockholder, that the stockholder, as between himself and the creditors, *at his peril* suffers this to be done, and he is *bound* to institute proceedings against the company to dissolve the relation, and remove his name as a stockholder from the books of the company.

The Circuit Court seems to have thought that the course of English decisions upon this question was based entirely upon the peculiarity of their law requiring a registry of shares. This Court will take judicial notice of the fact that by the common custom of all stock companies in this country a registry of shares is kept. The stock books of a company are a necessity to its business. The evidence shows that such a registry was in fact kept by this Insurance Company, and that defendant's name was duly entered upon it as a stockholder, and that the by-laws of the company, see Sec. 21, page 32, of the record, required a transfer of the stock to be made at the

liability to Waite. There is nothing in the record showing that Waite was a party, or had any notice of that proceeding. The mere possession of the note and mortgage determined nothing. Waite's right in a court of equity to foreclose the mortgage was not impaired by the commencement of that suit, and the commencement of the suit was all the proof defendant made on the subject.

We find that several months after defendant's alleged offer to surrender his stock a draft was sent to defendant for his dividends on the stock. Instead of refusing it, he receives it, and retains it for several weeks for the pretended purpose of consulting with counsel in the matter "to ascertain his legal rights." He retains possession of it until the 25th of September, 1871, and then, only thirteen days prior to the happening of the event which made the company bankrupt, he hands it to Overton, the Secretary of the Bloomfield branch. An act prompted in fact by the fear that the retention of the draft for the dividend would compromise his position in the suit which he instituted on the *very day* he returned the draft, against the bank at Bloomfield, and its cashier, to get possession of the note which, as he had learned the February previous, had been sold and transferred by the company to another party, who had forwarded it to this bank for collection of interest due upon it. Clearly the relations existing between the company and the defendant at the time he received this dividend were such as that the defendant might legally have retained it, notwithstanding his pretended offer to surrender to the company made months previous to that time. Not only so, but even after the refusal to receive a dividend if the company does no act recognizing a discontinuance of the relation of stockholder, but persists in so regarding him, he would have the legal right to elect to continue in such relation, and receive dividends on his stock. It is clear that, so long as he is in a position, where he can compel payment to him by the company, of dividends, he may, by the *creditors* of the com-

pany, be compelled to pay in his unpaid stock. Whatever may be the rule as to disaffirmance of voidable contracts as between individuals, the interests of the public require that something more than a mere offer to surrender stock in an incorporated company should be requisite to a dissolution of the relation, and the withdrawal from the corporation and its creditors, of any portion of the fund pledged to them in payment of their claims. The course of the English decisions shows very clearly that a bill should be filed for the purpose of annulling the contract of subscription, and removing the name of the stockholder from the books of the company. A similar course ought to be pursued here. We do not say that when the company concedes in good faith the *right* to disaffirm and surrender, that a bill need be filed, but we do say that in all cases, when the company refuses to accept of the surrender of the stock, and persists in holding out the party as a stockholder upon the books of the company, and by embracing his stock in its reported amount of subscribed capital, or in short, whenever the company refuse to recognize a discontinuance of the relation of stockholder, that the stockholder, as between himself and the creditors, *at his peril* suffers this to be done, and he is *bound* to institute proceedings against the company to dissolve the relation, and remove his name as a stockholder from the books of the company.

The Circuit Court seems to have thought that the course of English decisions upon this question was based entirely upon the peculiarity of their law requiring a registry of shares. This Court will take judicial notice of the fact that by the common custom of all stock companies in this country a registry of shares is kept. The stock books of a company are a necessity to its business. The evidence shows that such a registry was in fact kept by this Insurance Company, and that defendant's name was duly entered upon it as a stockholder, and that the by-laws of the company, see Sec. 21, page 32, of the record, required a transfer of the stock to be made at the

office of the company by signing the forms *provided in the office of the company*, and article 23 provided that the "books of the company kept *for the transfer of stock* should be closed ten days previous to any annual election. A report of the condition of this company was required to be made and recorded in the office of the Auditor of State, and the company was subject to visitation, and its books to examination by authority of law, by the officers and agents of the State.

Upon what principle then can we avoid the just and only safe rule so wisely adopted by the English Court. What is the difference in fact? A register is kept of the stock and of its transfer. This is the basis of the company's organization and of its credit, and it is upon this fact that the English decisions are based. The principle involved in those decisions is simply this: "that so long as the books of the company accessable to the public, show a party to be a stockholder, that as to creditors he must be treated as such, and is equitably estopped from denying his liability, unless by *lis pendens* before insolvency, he has given notice to the public of his right and claim to be released from such relation. He must place himself by judical proceeding, actually and in good faith commenced in the unequivocal position of rescinding the contract, and nothing must be wanting to an actual dissolution of the relation, except the time necessary to such an adjudication of his rights.

See *Oaks vs. Turquand, &c., Law Reports—2 H. L., 351. Henderson vs. The Royal British Bank, 7 E. C. L., Vol. 90, 356. Lawrence's case, Law Reports, 2 Chy. 412. Wilkinson's case, same, 537.*

Under the instructions of the Court in this case to the jury, and the facts clearly set forth in the record, it is manifest that the talk of the Court about not allowing the defendant to play fast and loose, was so much gilding that was robbed of all its meaning and force, by guiding the jury to the conclusion

that the defendant might be released without any evidence that his relation to the company, as a stockholder, had ever been in fact dissolved, or that any attempt based upon the fraud complained of had ever been made to dissolve it ; that his name might remain upon the stock book of the company, and his stock be officially reported as assets of the company, upon the faith of which the company might obtain credit, and yet the defendant still escape all liability. That the defendant might remain listlessly ignorant, for eighteen months, of the plainest and most important provisions of the law of the very corporate being of which he was a part, and when the insolvency of the company made it to his interest, to find out that he was deceived, it was sufficient to be informed of it by the demand of the creditors or of the assignee in bankruptcy.

We have already extended this argument to considerable length. The case is an important one and involves important principles, as well as important interests. The great Chicago fire ruined many families and many men of business. Against this calamity the parties, here represented by the plaintiff, had, in good faith, so far as it was possible to do, provided, by the payment of their money for indemnity. The ruling of the Circuit Court makes this security a delusion and a snare. It may be a hardship upon these stockholders to pay up the amount of their stock. By deliberate contract they embarked in the enterprise of taking such risks. It may be they were deceived as to the nature of the contract they entered into. The hope of gain may have overcome their prudence, and the prospect of owning a large amount of stock and receiving large dividends upon the investment of one-fifth only of the captal they subscribed, may have blinded their reason.

The creditors have made no mistake. They are here asking the relief they contracted for and that the law assured them. They appeal, now, to the highest judicial tribunal of the nation for the recognition and enforcement of the contracts they and this defendant have entered into.

We have not taken up the several assignments of error in the order in which they were assigned, for the reason that we have thought by classifying the instructions asked and refused, and putting them alongside of such portions of the charge as embraced the same subject matter, we could evolve the propositions of law covering the case, and thus argue them more briefly and satisfactorily.

On the trial of the cause we prepared these instructions with great care, and are fully satisfied that they contain the law applicable to the case, made before the jury. We insist here that the refusal of each of them was error. The charge of the court does not seem to place any very distinct propositions of law before the jury. It is a wonderful amalgamation of the several distinct defenses set up in the answer, none of which are assumed in the charge of the court to be sufficient in law. One defense, though incomplete, is supposed to be good for one purpose, and another defense, though wholly inadequate, is supposed to be sufficient to patch out the former. We have tried to analyze the document as well as we could, and to separate it into distinct legal propositions, and to bring it to the test of the authorities we have cited.

Believing that it is erroneous in its whole scope and tenor, as well as in the particulars pointed out, and that the court erred in refusing the instructions prayed for, we ask that the cause be reversed, for the errors assigned, and that a new trial be awarded.

C. C. NOURSE,
*For Nourse & Kauffman,*
*Attorney for Plaintiff in Error.*

REPLY OF THE PLAINTIFF IN ERROR.

# UNITED STATES SUPREME COURT.

## NO. 780.

C. W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT, PLAINTIFF IN ERROR,

VS.

J. D. TRIBILCOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

C. C. NOURSE, ATTORNEY FOR PLAINTIFF IN ERROR.

IN THE

# SUPREME COURT

—OF THE—

# UNITED STATES.

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C. W. UPTON, Assignee,
*Plaintiff in Error,*

*vs.* — No. 780.

J. D. TRIBILCOCK,
*Defendant in Error.*

## REPLY OF THE PLAINTIFF IN ERROR.

In replying to the argument filed in this case in behalf of the defendant in error, we feel some embarrassment growing out of the fact that we were engaged upon the trial of the cause, and had a personal knowledge of what occurred upon the trial, whereas the gentleman who prepared the argument that is filed herein in behalf of the defendant in error was not then engaged in the case, was not present when the same was tried, and seems to have felt free to draw upon his imagination for his statement of what occurred on the trial. The bill of exceptions which certifies the evidence in the cause is in narrative form, and is as full as is permitted by the rules and practice in this Court. It was carefully prepared and submitted by us to the counsel for defendant in error, who tried the case, and by them amended and afterwards submitted to the Court, and by the Court amended until everything was put in the

record that could by any possibility assist the verdict of the jury. We have a serious objection, at this stage of the proceedings, to have the record amended or enlarged by one who knows nothing about the case. We hardly expected that in the appellate court the counsel for defendant in error, or any one else that they might employ, would undertake to sustain the Circuit Court in the manifest errors committed upon the trial in its instructions, and are not disappointed in the effort that is made to get away from the case as it really exists, as it was tried, and as it is presented by the record. The attempt to divert the attention of the Court from the instructions given by the Circuit Court, and the grounds upon which the Circuit Court planted the case and directed the jury, is a necessity with defendant in error.

The attention of the Court has been called to the fact that defendant filed three answers in this case, an original answer, an amended answer, and a second amended answer. The first answer was merely a general denial. The second answer, filed November 10th, was demurred to and the demurrer sustained by the Circuit Court as constituting no defense. Thereupon defendant, by leave of Court, filed his second amended answer, or answer number three. Very much of this answer number three is a rehash of the matters set out in the amended answer to which the demurrer was sustained, and which the Court held insufficient in law. The additional and material matter that is set up in the second amended answer, and which the Court below sustained as sufficient in law to constitute a defense, relates to the averment of the surrender, or offer to surrender, the certificate of stock and to rescind the contract under and by virtue of which the defendant became a stockholder in the company. By examining the charge of the Court and the record of the evidence offered, as set forth in the bill of exceptions, it will be seen that the whole trial in the Circuit Court turned upon three essential questions, presented in our first argument :

First, whether or not there was any false representations or fraud practiced upon the defendant to induce him to become a stockholder.

Secondly, whether or not he used reasonable dilligence in the discovery of such fraud, and discovered the same prior to the insolvency of the company.

Thirdly, whether or not upon the discovery thereof he placed himself in any position that in law absolved him from the duties and obligations of a stockholder, as between himself and the creditors of the company.

Now it is conceded in the bill of exceptions that there was no evidence whatever that the defendant Tribilcock, ever discovered that there was any fraud practiced upon him with reference to the non-assessable character of the stock until after the insolvency of the company, and after the decree in bankruptcy had directed the assignee to make demand upon him for this 80 per cent. The bill of exceptions on page 85 of the record states expressly that :

"Defendant offered evidence to show that he was a citizen of Iowa, was ignorant of the laws of Illinois, and of the charter of the company, and believed the statement of the company's agent that the stock was non-assessable and that the company could not collect the 80 per cent., and that he never suspected any liability as to the 80 per cent. until the agent of the assignee made demand upon him for it in the year 1873, and that as no claim had been made upon him he never made any investigation as to the truth of the representations made to him until after the demand in 1873."

This was the defendant's own position and the evidence offered by himself on the trial. The fraud that defendant pretended to have discovered, and upon which he based the claim that he had offered to surrender the stock, was simply a representation, as he claimed, by the agent Overton, that the negotiable security payable to the order of the Great Western Insurance Company, and delivered to its agent in consideration of the stock, had been sold and transferred by the com-

pany, instead of being left under the control of the officers of the branch at Bloomfield. This was the sole ground as shown conclusively by the record, upon which there was any pretense that defendant had ever offered or attempted to dissolve his relations with the company as a stockholder, or to place himself in a position that he could not claim the profits and the benefits of that relation. The position assumed in the argument for defendant in error that the defendant never became a stockholder of the Great Western Insurance Company at all, and never sustained that relation to the company, and that the jury might have so found is hardly worthy of a serious reply. Defendant himself proves and admits a written subscription to the stock of the Great Western Insurance Company, and admits that he received from the agent of the company, a certificate of the stock subscribed for, and that he held said certificate up to the very day of the trial of this case and produced it in court in pursuance of a notice served upon him. And the certificate was not for two thousand dollars worth of stock, but was for one hundred shares of one hundred dollars each. It is said by the counsel for the defendant that this subscription paper was surrendered at the time the notes were given and at the time the certificate of stock was delivered. We call the attention of the Court to the fact that these notes and mortgages were given for the 20 per cent. of the stock subscribed for and the bill of exceptions recites that at the time of the subscription it was agreed that in lieu of the installments for this 20 per cent, that the defendant should execute his notes and mortgage and upon the execution thereof the subscription paper should be surrendered. In other words the note and mortgage took the place of the agreement to pay the 20 per cent. in installments and the certificate of stock delivered at the time to the defendant contained the terms of the contract by which he became a stockholder. The subscription paper answered its purpose. The agreement to become a stockholder was in writing. This

agreement was performed fully according to its terms when the note was given and the certificate of stock delivered.

The relation of stockholder was consummated and defendant Tribilcock became a stockholder in the Great Western Insurance Company.

Counsel for defendant in error have paraded in their argument all the romance set out in the answer in regard to a "Branch" and a subscription to a "Branch" of the Great Western Insurance Company. It will be seen by an examination of the record that there was no evidence to sustain all that false pretense or of any fraud being committed, or any false representations being made with reference to the Branch company. The defendant on the trial abandoned any pretense of fraud with reference thereto. By looking into the articles of incorporation introduced in evidence, and the by-laws it will be seen that those stockholders at Bloomfield who subscribed for $10,000 worth of stock were constituted directors of the company, and that in every city where $10,000 or more of stock should be subscribed, there should be established a branch office and the stockholders thereof should meet and elect one of their own members as president of the branch and one director of such branch for every $10,000 of stock taken. (See pp. 32 and 33 of record, § 25 and 26 by-laws.)

There was no evidence offered on the trial, nor is there any intimation in any of the instructions given by the Court of any bad faith in reference to this matter, or that this Branch was not established in the manner provided for in these by-laws. There was no evidence tending to show any representations in regard to the Branch. By turning to the testimony offered by the defendant himself, to-wit: his own sworn petition in replevin, in the which he makes a statement of the grounds upon which he first sought to repudiate his liability on these notes, it will be found that the defendant does not

pretend that he was not a subscriber to the stock of the Great Western Insurance Company. (See page 38 of the record.) He says:

"That the subscription of stock, at Bloomfield, Iowa, to the *Great Western Insurance Company* should be held by stockholders at said place and remain under their control, the same as the stock in the Southern Iowa Insurance Company, at Bloomfield, had been controlled."

By referring to page 33 of the record it will be seen that the Court certifies that:

"Defendant on his part offered evidence tending to show that he was induced to take one hundred shares of stock *in the Great Western Insurance Company* upon the representations of one Overton, an agent of the company with power to solicit and take subscriptions to stock, residing at Bloomfield, Iowa; that 20 per cent. of said stock only had to be paid in any event, and that said stock as to the 80 per cent. was 'non-assessable,' and created no personable liability, and that the stock certificates were so endorsed to show such non-liability, and that said Overton, to induce defendant to subscribe, exhibited to defendant at the time a blank certificate, a specimen of the stock with the words 'non-assessable' printed across the face thereof in large letters."

We say, with this record before us, we think the complaint unfounded that we were wrong in the statement of our case, in stating that defendant became a stockholder in the Great Western Insurance Company by agreeing to take one hundred shares of the capital stock, of one hundred dollars each, in the month of September, 1870. Counsel for defendant further states:

"That the gist of the complaint was that all the representations about the branch company were simply so many false pretenses to enable Long to get possession of this note and transfer it to Chicago, and that there never was any truth in the statements of Long or Overton in regard to this branch company."

Our answer to this is, that Mr. Long's name no where appears in the evidence, nor was there any evidence given with regard to his connection with defendant's subscription. That there was no evidence of any representations in regard to the branch company, further than what is contained in the by-

laws, a copy of which was left with the defendant, and there was no evidence whatever of any falsehood in regard thereto. Nor does the Court anywhere in its charge to the jury refer to any pretense of fraud growing out of any representations about the branch company. We are here to present to this Court a case that was presented in the Circuit Court, and upon which the Circuit Court certifies to this Court it based its instructions and charge to the jury. The question in this case is whether or not these instructions were erroneous. We do not claim that this Court shall reverse the verdict of the jury because of the insufficiency of the evidence to sustain it. What we do claim is, that if the law had been properly given to the jury, as we asked it, upon the testimony, that this verdict never could have been rendered, or if rendered, that the Circuit Court itself would have set it aside.

We come now to the argument of the first proposition presented by the defendant in error, to-wit: defendant's contract and its interpretation.

If we understand counsel for the defendant, he claims that as the defendant only agreed to pay 20 per cent. of the capital stock for which he subscribed, and as the stock was marked "non-assessable," and was agreed to be non-assessable, that he is only liable for what he had agreed to pay. The argument in a nut-shell reduces itself to this, whether or not a person can subscribe to the capital stock of an incorporated company, and by virtue thereof be entitled to share the profits and benefits and earnings of the company as a stockholder, and yet be exempt from any duty to pay for that stock. Defendant's counsel seem to be oblivious to the fact that such an agreement upon the part of a person becoming a stockholder is itself a fraud. To talk about the fraud upon the subscriber to the stock, is the merest subterfuge. It is the subscriber who is attempting the fraud, conniving at the fraud, desiring the fraud, hoping to profit by the fraud.

There are thousands who would desire to have such frauds practiced on them, if the courts will permit. They have everything to gain and nothing to lose by the arrangement.

It is to us inconceivable as a question of fact that any man ever made a contract for 100 shares of the capital stock of an Insurance Company for $100 each share, yet believed that there was no duty and no obligation upon him to pay up the same in any contingency. It is impossible to avoid the conclusion that if one may pay less than the capital stock suscribed he may pay nothing. If he may avoid the paying of the 80 per cent. by agreeing not to pay it, why may he not avoid paying anything by agreeing not to pay anything? His relation of stockholder to the company without an intention on his part in good faith to pay the money into the capital of the corporation, is simply infamous—in law, in morals, and in fact.

It is claimed by counsel for defendant in error that the English Act of 1862 in regard to companies, provides for a record of the amount of capital stock, the amount of shares taken, amount of calls made, calls received, amount unpaid, amount forfeited, names, occupations and residences of persons having ceased to be members since last list; that the company shall keep a register of all its members, in proper books, in its principal place of business, and that this register of the company is subject to public inspection, and it is claimed that the Illinois statute adopts an entirely different method of inviting public confidence.

We deem it a sufficient answer to all this, to say that the statute of Illinois provides absolutely, as a condition upon which the stockholder shall avoid individual liability, for the debts of the corporation, that the stockholders shall be liable for all debts and responsibilities of the company to the amount of stock by him or them subscribed, until the whole amount of the capital shall have been paid in and a certificate thereof recorded, as provided by law. It is said, in answer to this,

that the statute does not in terms render the holder of the certificate of stock liable for the par value of the stock represented by the certificate, less payments, but makes him liable for what he subscribes.

The word "subscribed," as used in the statute, refers to the capital stock of the company, and not to the amount of money that the subscriber has agreed to pay for the stock. There is nothing in this statute from which the Court could infer that the legislature of the state of Illinois were so idiotic as to have contemplated that the hundred thousand dollars of capital stock in an incorporated company should be owned and controlled by parties who had only subscribed for twenty per cent. of that amount. This would be a feeble dodge of the law.

Again, it is said that the law of Illinois did not require a report to the auditor of the amount of unpaid stock, or the amount for which the stockholders were still liable. The law required a report of the amount of capital stock of the company actually paid in. We are at a loss to understand how the report could be made of the amount of the stock that was actually paid in without also disclosing the amount that was not paid in. It is assumed that this law intended that the public should rely only on the amount of money actually paid in. If so, why should the statute provide that the stockholders should be liable for the stock they subscribed? We have here, then, first, a record disclosing what has been paid in and what has not been paid in, and a statute providing that the stockholders shall be liable to the creditors for that which is not paid in, and we have the argument of defendant's counsel that the creditors of the body corporate were not at all to rely upon the capital stock not yet paid, for which the stockholders were liable.

It is said, in behalf of the defendant, that the certificate delivered to the defendant is not stock, but is a written acknowledgment by the company of the interest of the sub-

scriber in its property and franchises. Let it be remembered, however, that the evidence in this case shows conclusively that this certificate was delivered in pursuance of a written agreement, for one hundred shares of stock, and that defendant received and retained this certificate as the evidence of that contract. This is the meaning of the word "non-assessable." It was to be paid for in a particular manner, that is out of the profits arising to defendant upon these ten shares for which he subscribed. Now this limitation as to the manner of payment as to creditors is simply void, and it was so held to be by the Circuit Court, and from this ruling of the Circuit Court there is no appeal upon the part of defendant in error, and the point here argued and made is really not a question before this Court. The Circuit Court conceded that the defendant was liable to the creditors for the whole amount of stock subscribed, as far as the same remained unpaid at the date of the company's insolvency, unless the defendant established, first, fraud in procuring the subscription ; second, diligence in the discovery of the fraud ; third, an actual repudiation prior to the insolvency of the company.

The error of the Circuit Court consisted in its refusal to charge the jury properly as to what constituted fraud under the circumstances of this case. Secondly, as to what constituted a proper repudiation of the contract. Thirdly, what constituted proper diligence in the discovery of the fraud, and fourthly, in using the words "some respects" by which the jury were permitted to find fraud in one thing and a repudiation, based upon an entirely different thing.

These questions, so fully argued by us in our prior argument, have not been met in the argument filed in this case for defendant in error. Under the head of the defense of fraud in the argument for the defendant in error, reference is made to our position, that the first answer made by defendant was, that he never intended to pay, and that he contracted in the beginning that he would not pay for his stock unless the ven-

ture proved a profitable one, and it could be realized out of the profits accruing by way of dividends. It is said that there is no such answer as this in the record. We do not refer to the terms of defendant's written answer, but to the theory of his defense.

It is admitted that defendant did subscribe for this stock upon just such terms as we here indicate, and that the stock was delivered to him in pursuance of that agreement. But it is said that this paper was left with the agent, upon the agreement that it was not then to be delivered to the branch company, the only company then talked of, etc. We say there is not a particle of evidence in the record in regard to any talk about the branch company. The subscription was to the Great Western Insurance Company, and the subscription paper was delivered to the agent of the Great Western Insurance Company, and the only reason why it was surrendered was that the subscription paper provided for the payment of this 20 per cent. in cash installments, in lieu of which cash installments the note and mortgage were given. So far as the terms upon which the 80 per cent. of the stock was to be paid the agreement was not changed.

An attempt is made to avoid the main point in this case, by stating that there was doubtless evidence of other facts brought to bear upon the mind of defendant before there was anything said about the law of Illinois. The substantial averment in defendant's answer, and the only averment at all sustained by any proof whatever of fraudulent representation, is the averment that the agent of the company represented that the stockholders could not be called upon, except for the 20 per cent. That under the law of Illinois such a contract was legal; that the officers of the company had taken the opinion of lawyers who had so advised them.

The Court, in its charge to the jury, recites these representations, and says that—

"If you find that defendant relied upon such representations, and believed them, and made the subscription, and afterwards received the stock certificate upon the faith of such representations, that they are of such a character that it *cannot* be said as a matter of law that the person to whom they were made had no right to rely upon them."

We asked the Court to instruct the jury as set forth in the 3d, 8th, and 9th instructions asked, which were refused.

The 9th instruction asked by us was as follows:

"That if defendant became a stockholder of an insurance company, organized under the laws of the State of Illinois, it was his duty to know the effect of his contract, and the extent of his legal liability, and he cannot avail himself in this action of his ignorance of the law of Illinois, or that the extent of his liability under that law was misrepresented to him by the agent of the company to induce him to take stock."

Now the question for this Court to determine is, does this instruction asked for by us contain the law, or is it contained in the charge of the Court? Not a single authority is cited by counsel for appellant, tending to sustain the position assumed by the Court. It is virtually conceded, that if defendant became a stockholder in the Great Western Insurance Company, he was bound to know the law of its organization. If the Court had so instructed the jury, it would have been an end of the defense made in this case. It is no answer to our claim, that the jury should have been properly instructed upon this point, to say, that the holding of this certificate was not conclusive evidence that the defendant became a stockholder. The question as to whether he had become a stockholder was certainly submitted to the jury, with abundant evidence to sustain the point, and we asked the Court to instruct the jury that, if he became a stockholder of an insurance company, organized under the laws of the State of Illinois, it was his duty to know the effect of his contract, and the extent of his legal liability.

All that is thrown into the argument in behalf of defendant about what Long would probably know and about Long

being a shrewd man, is entirely foreign to this case, for there is no evidence that Long ever saw or communicated with the defendant at all. The contract for the stock was made with Overton, a citizen of Bloomfield, one of defendant's neighbors, and a man who had been associated with him in the insurance business before he became a subscriber to this stock. This is shown by their own answer and by the evidence.

We think counsel for defendant falls into some confusion in his citation of English authorities, which are based upon the question as to whether or not defendant is bound by a prospectus he has not seen. In this case it is conclusively shown that the articles of incorporation and by-laws of the company were left with the defendant for his examination before he subscribed for the stock. Upon this question there was no conflict of evidence. The law fixing his liability was a public statute of the State of Illinois, and the corporation to which he subscribed stock he was fully advised was created by and existed under the laws of Illinois.

Now it is conceded that the representations as to the legal effect of the contract is not a representation upon which the charge of fraud can be predicated. But it is claimed that as this statute of Illinois was a foreign statute, or a statute of another state than that in which defendant resided, that therefore he was not bound to know of its existence. But our answer to this is that he was bound to know the statute of that State of which the corporation was a citizen, of which he became a member, and *if* he did become a member of such a corporation he was bound to know the law of the State that fixed his liability and his duty and obligations, and he cannot be heard to plead ignorance thereof. If this is the law why should the Court refuse this 9th instruction asked by us, and tell the jury in its charge that :

"Such representations as to the character of the company and the laws of another State, aided by the artful and deceptive form of the certificate itself, are of such a character that it cannot be said as a matter of law that the persons to whom they were made had no right to rely upon them."

It is further said by counsel for defendant in error that there is scarcely a doubt that the verdict would have been the same if this evidence had not gone to the jury. This might have been so if the statements that are made in the printed argument to help out the bill of exceptions could have been given to the jury as a verity without any curb at all upon the imagination of the p rty who wrote the argument. But in view of the fact that there was no evidence of any other fraud but this and the representations relating to the transfer of the promisory notes and in view of the fact that the whole case is given to the jury upon these two suggestions of fraud in the charge of the Court, we think that this Court would not be justified in saying that there was anything else in the case upon which a verdict might have been based.

We come now to the attempt to avoid the force of our argument in regard to the discovery of the fraud and the repudiation of the contract by defendant.

We do not find fault with the charge of the Court below, that —

"As respects creditors, the law requires of one who has been drawn by fraud into the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud, and on discovering it, promptly repudiating the purchase."

But we call the attention of the Court once more to the fact that the Court certifies, in the bill of exceptions, that :

"There was no evidence that at any time, when there was an offer to surrender the stock, or a demand for the return of the notes, any thing was said about any fraudulent representations as to the non-assessable character of the stock, or as to the 80 per cent." (See page 37 of record, ℣ 87-88.)

On page 35 of the record it is further stated —

"That evidence was produced to show that defendant was a citizen of Iowa, and was ignorant of the laws of Illinois and of the charter of the company, and believed the statement of the company's said agent, that the stock was 'non-assessable,' and that he could never in any event be made liable to pay any part of the 80 per cent., and that the company could not collect the 80 per cent., and that he never suspected any liability as to said 80 per cent., or

that the said representations as to the laws of Illinois were false, until the agent of the assignee made a demand upon him for the 80 per cent., in the year 1873, and that as no claim had been made upon him, he never made any investigation as to the truth of such representations until after said demand in 1873."

Now what we object to in this part of the charge, is what follows the preceding sentence, to-wit: that the Court told the jury that if they found—

"From the evidence, that within a few months after receiving said certificate of stock, the defendant discovering that he had been deceived in *some respects*, procured the agent who had obtained his subscription to go to Chicago, &c."

In view of the facts in this case, these words, "some respects," necessarily misled the jury, and the Court intended to tell the jury, beyond a question, that if they found that defendant had been deceived in the misrepresentations as to the laws of Illinois, they should find fraud, and then told them that he should be guilty of no negligence or want of care in discovering fraud, but that if he had within a few months found he had been deceived in "some respects," and had offered the stock back, that these "some respects" would answer the diligence of discovering the fraud.

There is no question in this case that the attempted repudiation of the stock was based solely upon the fact that the defendant's negotiable promissory note had been transferred by the company, contrary to the promise or representation of the agent. Now the Court in its charge to the jury does not pretend that this was in law a fraud. Still the Court refuses to instruct them as asked by us, that it was not a fraud, but left it as the "some respects" upon which the jury might find diligence in discovering fraud, and promptness in repudiating the contract. The bill of exceptions clearly shows that defendant made no inquiry, made no investigation as to his liability as to this 80 per cent., or as to what the law of Illinois was, until after the insolvency of the company.

His entire petition in replevin, in which he claims possession of these promissory notes, mentions no fraud in misrepresenting the law of Illinois.

The bill of exceptions states that when he sent Overton to Chicago to tender back the stock, he based the right to do so *solely* on the ground that he had been deceived in respect to the sale of his notes by the company, and misrepresentations in regard to the branch. Now, the only misrepresentations in regard to the branch that were proved upon the trial, or upon which there was any evidence whatever, was that the *branch should retain control of these notes.*

It seems to be conceded in the argument for defendant in error, that the representations by the agent that these notes would be held by the company or be left under the control of the officers of the branch society, was a mere promise upon which an allegation of fraud could not be predicated and an offer to surrender the stock based upon such a charge of fraud would be of no avail. In view of these positions the Court was asked to instruct the jury that if the defendant offered to surrender his stock upon the ground that the company had sold and assigned his notes and mortgage that the evidence of such offer to surrender would be immaterial. (See p. 42, of record, instruction number 7 asked for by plaintiff.)

Again, in instruction number 5, the Court was asked to say to the jury—

"That a violation by the company of the promise or understanding between the agent and defendant, in regard to the sale or exchange of the note and mortgage, did not justify a demand of the cancellation of defendant's notes and mortgage, and his offer to surrender the stock on that ground alone, and upon the condition that the notes be delivered up if proved, constitutes no surrender of the stock, and did not release defendant from his liability as a stockholder of the company to the creditors thereof."

This instruction the Court refused to give. That there was testimony justifying us in asking such instruction is beyond controversy.

The bill of exceptions certifies that upon this subject there was only two witnesses testified, both of them witnesses introduced by defendant; one, the defendant himself, testified that Overton (to induce defendant to subscribe) represented to defendant, when the notes and mortgage were given, that said notes and mortgage should remain at Bloomfield, under the sole control of the branch at Bloomfield, which would be established there, and would be collected only as they needed the same to pay losses, and that the company would not sell or transfer them, or remove them from the Bloomfield Branch. This was all the testimony on this subject favorable to defendant's view of the case, whereas Overton, his other witness, testified on cross-examination that he did not represent that the notes and mortgage would remain at Bloomfield, under the control of the officers of the branch, but that he did represent that the company would treat them as a loan of money to defendant, and that the company would extend the time of payment until they needed the money, and that the company would not sell or transfer the note and mortgage.

Now, with this testimony before the jury, and all the testimony that there was tending to show any fraudulent representations upon which a demand for the surrender of the note and mortgage was based, upon what pretense can it be claimed that the Court did not commit error in refusing the instructions asked on this point? It will not do to attempt to help out this matter by the extraordinary statements of counsel, not sustained by the record, that there was other evidence of fraud or fraudulent representatons in regard to obtaining these notes. None whatever is mentioned by the Court to justify him in refusing the instructions asked for.

Again, the Court was asked to instruct the jury that this petition in replevin was not a repudiation of defendant's relation to the company as a stockholder therein. We do not understand counsel for defendant to claim that it was. Then why should the Court refuse the instruction asked?

By an examination of the petition in replevin, it will be seen that there is a careful suppression of any reference to the fact that defendant, Tribilcock, plaintiff in said petition, had subscribed for one hundred shares of stock, or that he held any certificate for one hundred shares of stock in said company.

There was no attempt whatever to make the Great Western Insurance Company a party to said replevin suit. There was no attempt whatever to set out the contract by which he became a stockholder, and there was no effort to repudiate said contract, or have the Court declare the same void. The suit in replevin was simply an attempt to get possession of the notes and mortgage without making the persons interested in the notes and mortgage parties thereto. There was no attempt in this suit of replevin to dissolve the relation that defendant held to the company as a stockholder—nothing binding upon Tribilcock. Nowhere does he place himself in a position that he cannot claim the benefits of dividends as a stockholder of the company in case the company had prospered. It is true that Mr. Tribilcock did return to the secretary of the company, Overton, the drafts that he had held for the dividends on his stock, but this he did after a very suspicious and unexplained delay on the eve of the day that he brought the suit in replevin, and under the advice of counsel, simply for the purpose of avoiding the effect that the holding of said draft might have on his suit in replevin. As to the repudiation, or attempted repudiation, we asked the Court to instruct the jury that a mere demand for the notes and mortgage, and a mere offer to surrender the stock, upon the part of the defendant, was not a dissolution of his relation to the company as a stockholder. Was this instruction law? If so, what excuse was there for refusing it?

Again, counsel for the defendant come to the relief of the Court by attempting to supply testimony that is not hinted at in the record. That the visit of Overton to Chicago did not

contemplate a surrender of the stock is very clear from the fact that defendant himself testified that he did not send his stock certificate with Overton. That Overton simply demanded the note and mortgage alleging as the sole ground for said demand the promise of Overton that said notes and mortgage should be retained by the branch at Bloomfield. This demand, let it be remembered, was made through the man who, under oath, testifies that the ground upon which he made it was false, that he never made any such promise.

Is it probable that the company's officers would have surrendered the notes and mortgage upon a demand made by a man who claimed that the ground upon which he made it had no foundation in fact, but was falsely and fraudulently trumped up?

But the real question for the Court to determine is whether or not this demand for the notes and mortgage based simply upon a claim that the company had violated the contract of its agent by negotiating the notes and mortgage without more, dissolved Mr. Tribilcock's relation to the company as one of its stockholders.

We have, in our former argument, asked the question, whether Mr. Tribilcock could not, after all that had transpired, still have claimed his dividends. Was there anything that he said or done at any time in connection with this whole matter, prior to the insolvency of the Great Western Insurance Company, that placed him in a position that he could not have claimed all the profits that would have arisen out of his relation as a stockholder? If not, it is clear that he must be held liable as a stockholder, and that he must bear the responsibilities of that position.

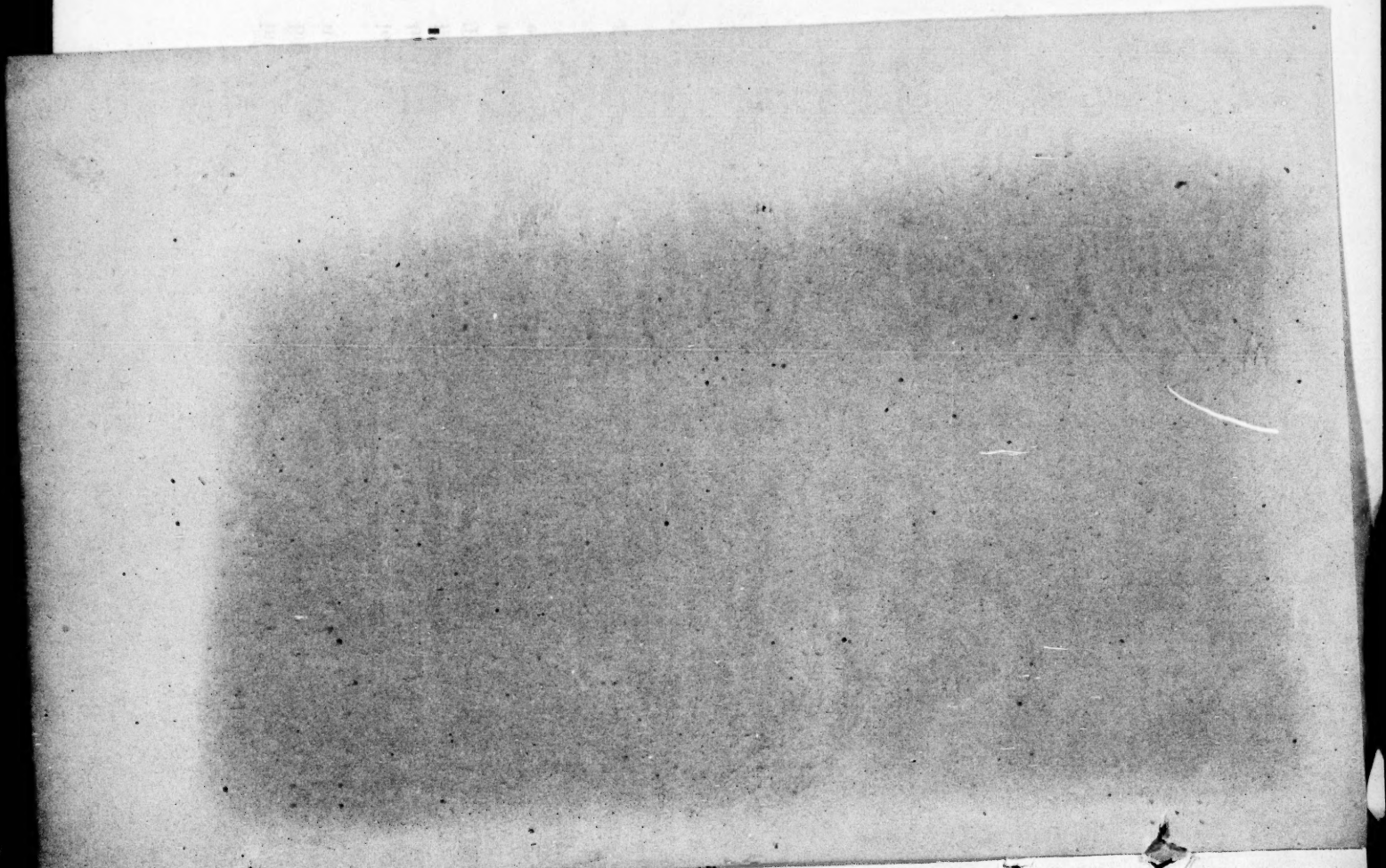
It is said repeatedly in the argument of counsel for defendant, that the testimony given in the Court below is not before this Court. We understand the rules and practice of this Court do not permit us to have certified to this Court, in a case at law, all of the testimony in detail as it was given by

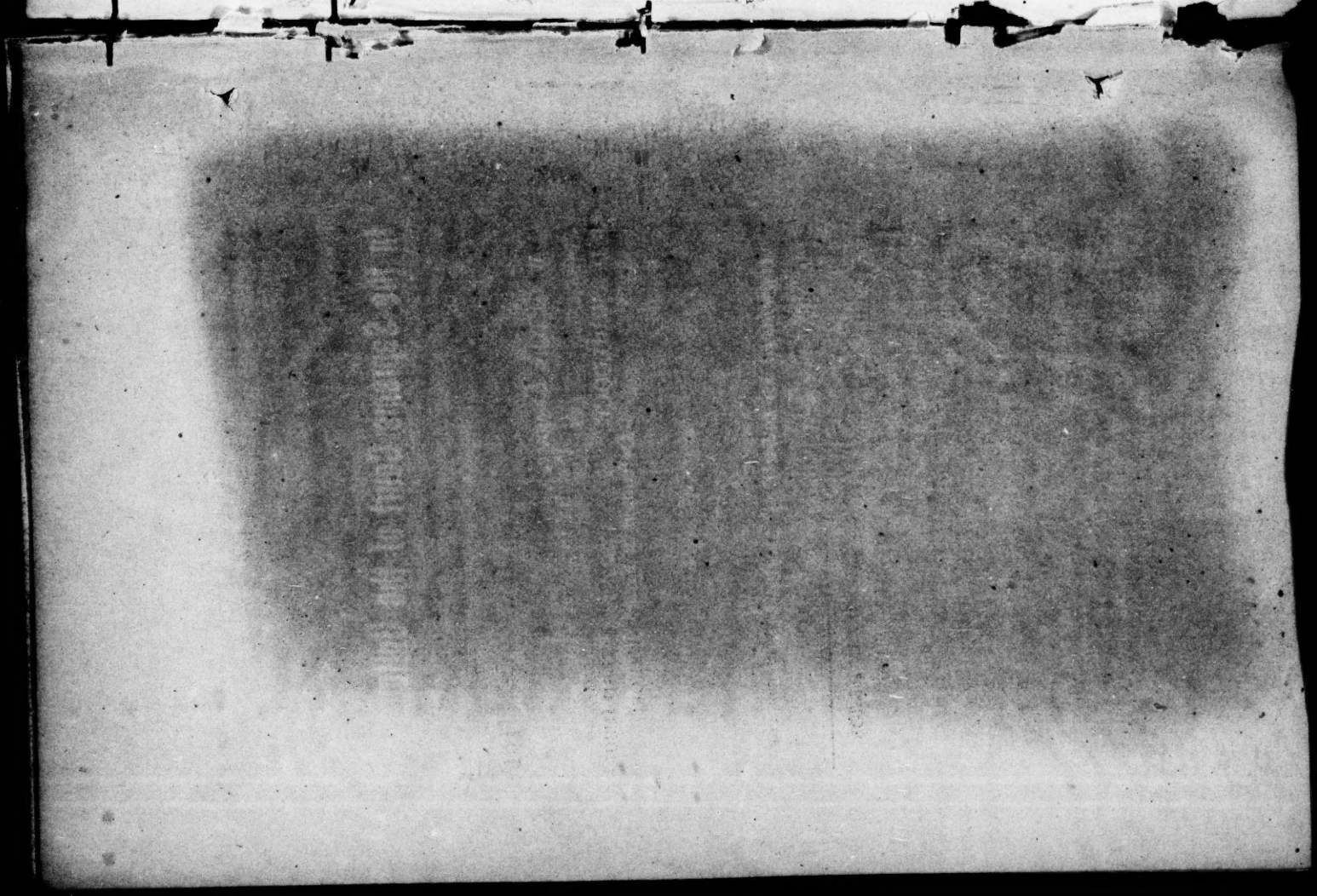
each witness. The bill of exceptions purports to be and is a full and accurate account of all the evidence in the case, and of all that the testimony tended to prove. The Court certifies in substance, that nothing is omitted in that bill of exceptions that would enable this Court to determine the materiality of the instructions given, and of the instructions asked and refused.

The attempt, in the argument for defendant in error, to get rid of the positions assumed by us by affirming or intimating that there was, or might have been, other evidence upon the various points suggested that would have justified the Court in instructing as he did, or refusing to instruct as he did not, is entirely illegitimate. We made this bill of exceptions as full as the Circuit Court below would certify it, and it is complete so far as it is necessary fully to understand the nature of this case, or the points relied upon by the defendant, and the instructions upon which their defense was based.

We submit the case in confidence to the Court, calling your attention again to the positions assumed by us in our first argument, which presents the case very fully, and we have no desire here to repeat the positions which we there assumed, and which we think are entirely unanswered by the argument filed herein for the defendant in error.

C. C. NOURSE,
*of Nourse & Kauffman,*
*Counsel for Plaintiff in Error.*





# In the Supreme Court of the United States.

C. W. UPTON, Assignee,
Plaintiff in Error,
*vs.*
J. D. TRIBILCOCK,
Defendant in Error.

***Argument in behalf of Defendant in Error.***

Plaintiff's statement of facts is neither full nor impartial. We invite the attention of the court to this fact in the beginning, and to such additions and corrections as may be suggested now and in the progress of our argument. But, as introductory, we ask attention to the general character of this case and to some principles of law which may most appropriately be considered in connection with the proposed further statement.

This is a suit at law on a petition claiming a money judgment.

There are three answers: An original answer, an amended answer, and a "second amended answer." There was a jury trial and a *general verdict* for defendant, and a bill of exceptions taken containing a narration of certain evidence

introduced on trial which "tended" to prove certain facts in the bill set out. All errors assigned, save one, pertain to the giving or refusal to give instructions.

This one exception relates to the refusal of the court to allow plaintiff to prove the amount and character of Insurance business done by plaintiff in 1870 and 1871. This assignment is not pressed in argument and hence, we infer, not relied on. The record does not purport to set out all the evidence, only so much and such parts, as seemed to the plaintiff in error, necessary to show the materiality of instructions.

Upon this record we claim as matter of law, that

1st. Every fact averred in answer material to support this general verdict is presumed to have been established by proof. *Ventress vs. Smith*, 10 Pet., 161. *Coffee vs. Planter's Bank of Tenn.*, 13 Howard, 183. *Felzer*, et al., *vs. McAnon*, 13 Wis., 63. *Kimbro vs. Bullett*, 22 Howard, 256.

The cases in Iowa to the same effect, are abundant, but we content ourselves with the following:

*Mays vs. Dever*, 1 Iowa, 216. *Brewington vs. Patton & Swan*, 1 Id., 121. *Conrad & Co. vs. Baldwin*, 3 Id., 207. *Freher vs. Geeseka*, 5 Id., 572. *Bridgeman vs. Steamboat Emily*, 18 Id., 509. *Garner vs. Pomeroy*, 11 Id., 149.

2d. This court will not look into the record for any purpose except to determine whether there were errors of law.

*Prentice vs. Zane*, 8 Howard, 470. *Zeller vs. Eckert*, 8 Howard, 289.

This court will not hear, on error, matters which are properly the subject of an application for new trial.

*Freeborn vs. Smith*, 2 Wallace, 160. *Henderson vs. Moore*, 5 Cranch, 11. *Bar vs. Gratz*, 4 Wheaton, 213. *Blunt vs. Smith*, 7 Wheaton, 248. *Brown vs. Clark*, Howard 4.

These legal propositions will aid us not only in making a statement of facts that will present this case more fully and impartially than that made by plaintiff, but will also enable us to

dispose of very many matters contained in plaintiff's statement, as also in his argument which, as we regard, are wholly immaterial—not pertinent to any question presented by the record.

*Reference to Pleadings.*

The "second amended answer" commencing on page 17, "Transcript of Record," sets up *fraud* as one of the defenses and avers, in substance, that there was, prior to July, 1870, a small Insurance Company, existing in Iowa, called the "Iowa Southern Insurance Company," with its principle place of business at Bloomfield in Davis County, Iowa. That its membership was made up of citizens of Bloomfield and vicinity. That these members were well known, reliable business men of the neighborhood. That defendant knew these men and knew them to be honest men and had been associated with them in business for several years. That in July, 1870, one T. W. J. Long, claiming to be the agent of the Great Western Insurance Company of Chicago, Illinois, came to Bloomfield, and called on the stockholders of the Bloomfield Company, representing his Company to be wealthy, prosperous, and centrally located, and desired them to subscribe to the capital stock of his Company, *which they refused to do*. That, afterwards, and in August, 1870, he proposed to these stockholders to have the Iowa Southern Insurnace Company merged into a branch of the Great Western Insurance Company, representing that the change would not interfere at all with it as an independent organization. That it would still control its business, its assets, take obligations and stock subscriptions, issue stock, &c. That the stockholders, including defendant, believing these representations, were willing to make the change *if it did not in any manner render them liable as stockholders in the Great Western Insurance Company and place their obligations under the control of the last named Company.*

That thereupon F. C. Overton who was Secretary of the

Iowa Southern Insurance Company, claiming to act as agent and Secretary of this pretended Branch Company wanted defendant to subscribe to this Branch Company. Long had previously represented to him, defendant, that this Branch *was being organized* and would be independent of the Great Western Insurance Company, and that Overton would be *its agent* and Secretary till an election of officers by it. Believing these statements, *i. e.* that a Branch Company *was being organized;* that it was *independent* of the Great Western Insurance Company and only auxilliary thereto, that he could deal with it as such and not incur any liability as a stockholder in the Great Western Insurance Company, that its organization was commenced and Overton was its agent, and that the other stockholders of the Iowa Southern Insurance Company were going into this arrangement, and that his rights and liabilities would be controlled by it he was willing to transfer his Iowa Southern Stock into this pretended branch and sign a subscription contract for one hundred shares of $100 each on conditions named, which, among other things, were that he was never to be liable for over twenty per cent. of same, and that the balance was to be paid *only out of profits*, and in no other way. That this contract was to be held and not to be delivered as a binding contract till all the members of the old Iowa Southern Insurance Company had agreed to transfer their stock in like manner. The answer further sets out that prior to the delivery of this subscription contract he became apprehensive that he might in some manner be made liable for the eighty per cent., and objected to its delivery. That, thereupon, Long proposed that if he (defendant) would execute a note for $2,000 (the twenty per cent.) secured by a mortgage, *this subscription contract should be surrendered* and *released.* That said note would be received in full payment of his stock, which was *nominally* $10,000, and that as a guaranty the subscription contract should be delivered up and a certificate for stock issued, show-

ing on its face that it was "non assessable," and that all obligations, papers, money, and other things pertaining to defendant's interest, and to said branch, should be left under its control. That defendant, relying on these statements, and others which are in the answer more fully set forth, did execute a note and mortgage and delivered the same to said Overton, as the agent of the pretended branch. That the subscription contract *was surrendered* and a certificate of stock was delivered to him as agreed. (See page 40, transcript of record, folio 102.) That said certificate did on its face purport to be issued by the Great Western Insurance Company, but that it was represented to defendant, on receipt thereof, to be only a matter of form, the stock in fact being stock in the Branch Company. The answer further sets out that defendant was a citizen of Iowa, and had no knowledge of the laws of Illinois, nor of the charter of the company, nor its manner of doing business, nor its powers and rights, or the rights and liabilities of its shareholders. That Long and Overton represented to him that the Company had the power to make such an arrangement and to issue such stock. That they exhibited a certificate with the words "non assessable" printed in large and conspicuous letters on or across it.

See also Bill of Exceptions (page 34, transcript of Record, folio 78).

The bill of exceptions shows that Long and Overton represented that the company's officers had taken the opinion of some of the best lawyers in Chicago as to the right and power of the Company to issue such stock and put it on the market for 20 per cent. of its par value in full payment, and that these legal gentlemen had advised them that such a contract was legal under the laws of Illinois, and imposed no personal liability.

The answer charges that all these statements and artifices of Long and Overton were false and fraudulent, were set on

foot and instigated by the Great Western Insurance Company, and that Long and Overton were prompted by said Company to make them.

The answer also avers: That in February, 1871, defendant learned that his note had been transferred to Chicago. That defendant thereupon sent said Overton to Chicago to demand his note and deliver back his certificate. That Overton went and made the demand and tendered back this certificate.

It is further shown by the bill of exceptions, (page 35, Transcript of Record folio 85–86), that Overton was thus sent, and did make the demand and tender. That in June, 1871, defendant in person went to Chicago and demanded his note and tendered back his stock. (See page 36, folio 87.)

That a dividend was declared in August, 1871, by the Company. That a remittance of $100 by draft, signed by Overton for defendant's share of this dividend, was sent to him, and by him returned to Overton. That in September, 1871, his note having come into the hands of J. W. Ellis, President First National Bank of Bloomfield, Iowa, he, the defendant, seized the same by Replevin in a suit commenced by him against the Bank, which suit was prosecuted to final judgment and the note awarded to defendant.

The answer avers further (see page 22, folio 47$^{r}$–47$^{s}$), that he never subscribed stock to the Great Western Insurance Company—never became a stockholder in the Company—never entered his name on the stock books of the same—nor authorized such entry. That if it was done, it was done without his knowledge or consent—never held himself out as a stockholder in the Company, nor authorized or allowed others to do so for him.

These are some of the leading facts which go to make up the defense.

### *Specific Denials of Statement of Plaintiff.*

Before proceeding with our argument we wish to make some further specific references to the plaintiff's "statement of facts." Counsel for plaintiff say on page No. 1, Argument: "defend-"ant became a stockholder of the Great Western Insurance "Company by agreeing to take 100 shares of stock of $100 "each."

This statement we deny, both as a matter of law and a matter of fact.

We deny as matter of fact that defendant ever agreed to take or intended to take any stock in the Great Western Insurance Company. As already shown the answer denies it. We not only have the benefit of the presumption in our favor, based on the *general verdict* for defendant, but that portion of defendant's evidence embraced in the bill of exceptions, shows there was evidence tending to establish this allegation. It shows that defendant understood (an understanding based on the representations of the Company's agent) that he was dealing with a Branch Company. Defendant's subsequent conduct in sending Overton to Chicago, going himself, returning draft for $100 and commencing his replevin suit can only be accounted for on the assumption that he thought he was dealing with the Branch Company, and became dissatisfied when he ascertained that the Great Western Insurance Company was seeking to get control of his obligations. It can make no difference what Mr. Overton testified as to what was to be done with the notes. The evidence of defendant and Overton was not the only evidence on this point. There was quite a large amount of other evidence favorable to defendant's view. If there was not, this court will not in any event, as we understand its practice, undertake to determine whether the jury should have believed Overton in preference to defendant.

Again, it is quite certain from the record that defendant did

not take 100 shares of stock, agreeing to pay $100 a share for each share. On the contrary it seems clear that the "subscription contract" which provided for the payment of $10,000 on conditions named, was delivered to defendant and released before the note was given and stock certificate delivered, and THERE NEVER WAS ANY AGREEMENT CONSUMMATED TO PAY ANY SUM OF MONEY OTHER THEN THE $2,000 NAMED IN THE NOTE. This we regard as an important fact in the case, and desire to call the attention of the court to it specially.

There was not only a surrender of this Subscription Contract, but, as avered in the answer, and shown by the bill of exceptions, there was a positive agreement that no other or greater sum was to be paid.

The plaintiff, on page 4 of the argument, says "it is claimed "that the Insurance Company violated the promise of the "agent in that they disposed of the notes." Here the plaintiff misapprehends the scope and grounds of defendant's complaint.

The complaint was that the notes, instead of being kept by Overton, as Secretary of the Branch Company, to be controlled by it and its directory, according to the agreement pursuant which it was given, was, by some person without authority, transferred to Chicago. And the *gist* of the complaint is that all the representations about this Branch Company were simply *so many false pretenses to enable Long to get possession of this note* and transfer it to Chicago, and that there never was any truth in the statements of Long or Overton in regard to this Branch Company.

The alleged complaint of defendant, as stated by plaintiff, is simply a man of straw when considered disconnected from other and more important complaints of defendant.

Again, on the same page, in speaking of representations as to the eighty per cent., plaintiff specifies as one of defendant's complaints that this eighty per cent. was to be paid out of the

earnings. Here again plaintiff is mistaken. We do not complain of that, for the "subscription contract" containing that provision referred to, was *surrendered* and released. Doubtless this contract with this condition in it was one one of the means designed to be used to perpetrate the fraud. When it failed, and defendant would not give his note for the $2,000, the prize which Mr. Long was so anxious to clutch, then *it was surrendered*, and terms, claimed by Long to be more favorable, were offered. *They proved successful; the note was obtained; Long was happy.*

Plaintiff further says (page 5, argument) "The note * "* * was a negotiable note, payable to order of Great "Western Insurance Company, and *defendant's own witness*, "*Overton*, testified that at the time it was given all that was said "in regard to it was, that the Company would consider it as a "loan to defendant, and would be indulgent and extend the "time of payment."

Well, what of it? How can it be material in this case what Overton swore or did not swear?

As we understand the practice of this court, it will not in a case like this, consider questions that could only be properly considered on a motion for a new trial. If the court were disposed to do so, there is no application for new trial in the case.

The evidence has not been certified to this court. A very small amount only is even alluded to, and if the entire testimony was a matter of record, and it appeared that no witnesses except Overton and defendant testified on this point, and that the jury had given defendant's evidence credit and discarded Overton's, we presume the court would not disturb the verdict for that reason. In point of fact a number of very respectable witnesses contradicted Mr. Overton on this point and fully justified the jury in disregarding his evidence.

This may account for the fact that the plaintiff did not move a new trial in the court below on the ground that the verdict

was contrary to the evidence, instead of coming into this court with a partial record and parading facts before it which if proper to be considered at all, and unexplained, would give to the trial in the court below an appearance of unfairness.

On the same page (5th of argument) plaintiff further says that "defendant procured it (the note) to be transferred to "Bloomfield * * for the ostensible purpose of seeing that "the payment of interest was credited on the note * * and "upon its arrival he sued out a writ of replevin."

This statement contains an inference charging fraudulent conduct on defendant which we deem unjust. Certainly there is nothing in the record justifying such a charge. It may be immaterial, but this is a reason why it should not be made.

Again, it is said (same page, 5) that the petition in replevin contains no allegations of fraud as to the 80 per cent. and no reference to the fact that defendant still held the certificate. That is true. It was not the purpose of this proceeding to rescind the contract. This is admitted; defendant had already at least twice tendered back the certificate. He had repudiated the contract—had returned the dividend. He was not holding the certificate with a view to profit by it, but because he could not very well avoid it, because the Company had *refused* to receive it when tendered.

On page 8 (argument) plaintiff says, speaking of Overton's mission to Chicago, in 1871, "defendant *admits* under oath that the certificate was not sent by Overton." This is not a fair statement (see Transcript of Record, page 36, folios 86–87).

The language of the record is—

"Defendant testified that he thought Overton did not take the certificate."

Same page says "Overton testified that he thought he did take the certificate." It is not an "admission" within the ordinary signification of this word for defendant to *testify* that

he thought Overton did not have the certificate. It is simply a matter of evidence to be weighed by the jury, like the evidence of Overton, tha the *thought he did take it;* to be weighed just as any other evidence in the case.

Viewed in that light we desire to apply to this evidence the observations made by us respecting the evidence of "Overton," "defendant's own witness" as to what was said about the disposition of defendant's note when it was given.

It is also said that "the Company's officers denied that any offer was made."

That is true. But if council for plaintiff thought it material to raise a question of veracity between Overton and the "Company officers," which we suppose means C. D. Hooker, they ought to have set out the letter wrtten by Hooker in February, 1871, to Overton, in which he admits the offer, and which was introduced by defendant as a very successful impeachment of the "Company officers."

The foregoing statement of facts will perhaps be sufficient to remove any unfair impressions which may have been created by the statement of plaintiff, and also enable us to enter into our argument with a hope of being able to express our views so as to be the better understood.

### *Argument for Defendant in Error.*

Counsel for plaintiff introduce their argument by referring to certain "general principles," including the "principle now regarded as elementary, that the capital stock of a corporation is a trust for the benefit of * * creditors."

We do not deem it necessary to controvert this proposition. We think the principle a just one, as generally applied by the courts, both English and American. There are extreme cases: some wherein it has been ignored; others where the justice of

its application is not readily seen; but, as a general rule, it commends itself on grounds of public policy. The difficulty lies in its application.

It may give more perspecuity to our argument to suggest our view of its application in arguing the points raised in detail as we reach them.

But we suggest now generally that we understand by the term "capital stock" referred to by the courts in the discussion of this principle, to mean assets—such means in possession or action as have a legal existence.

It does not refer to that kind of stock spoken of by the court in *Sturges v. Stetson*, 1st Bissel, 446, as a legal fiction, the mere franchise of the Company, or its power to create stock, nor has it any application to questions as to validity of contracts. It means tangible property. Stock subscribed, either paid in, or in a condition where payment may be enforced by law. The cases cited by counsel for plaintiff fully sustain us in this view, as we believe.

In *Curran v. The State of Arkansas*, 15 Howard, 304, the State of Arkansas had incorporated a bank, and placed its bonds in the bank, the proceeds of which was to constitute its capital stock. After the bank had incurred heavy liabilities and become greatly embarrassed, the State undertook to withdraw this fund. This court held that it was a part of the "capital stock," and that the State could not withdraw it and leave bona fide creditors without a remedy.

There are other questions in the case, but the only point of interest in the present discussion was the one just referred to. When once this court had decided that these bonds, or the proceeds, constituted a part of the capital stock, it followed, as a deduction, as inevitable, as just, that the fund was a *trust fund*, on which all bona fide creditors, who had given credit to the bank upon the faith that this fund belonged to the bank, and

constituted the means by which it was to be enabled to mee its obligations, had a right to rely, and that it could not be withdrawn till these debts were paid.

Had the defendant been a citizen, instead of a sovereign State, there could scarcely have been a question on this branch of the case.

In this case the assets had been paid into the bank. The State undertook to withdraw them. There was no claim that the bank had obtained them wrongfully.

The Court says, page 308: "The capital stock, when *paid* "*in* and *invested in* the corporation, becomes chargeable with "the trusts, and subject to the uses declared and fixed by the "charter. Plaintiff was the bearer of its bills by which it "agreed to pay a certain sum of money. These payments "were to be made out of the property of the bank. * * * "Any law authorizing a transfer of its property to its stock- "holders and leave debts unpaid is unconstitutional. It impairs "the obligations of the contract."

So in Angell and Ames on Corporations, Sec. 599 *et seq.*, the same doctrine is laid down. That is to say, the "capital stock is a trust fund"; but this authority is careful to state one important qualification, Sec. 602, where it is laid down that "though the *principle* in such cases was that the capital stock "is a trust fund, yet the *foundation* of the principle was the "agreement by the stockholders *to pay the sums by them sub-* "*scribed.*"

*Wood v. Dummer* was a creditors' bill to subject a portion of the capital stock that *had been in bank*, and had been taken out before the debts were paid, to the payment of such debts.

*Ogilvie, et al., v. Knox Insurance Company* was a creditors' bill to reach unpaid subscriptions to the stock of the insurance company. The securities sought to be reached by the bill were notes given for stock, and were unpaid.

Justice Grier, delivering the opinion of the Court, held that "each of the stockholders who had thus given his note became "in law a borrower from and debtor to the capital stock of the "company; * * that this 90 per cent. was as much a part "of the capital stock as the cash actually paid in." These notes constituted a part of the assets of the company, and the company could unquestionably have collected them. *They were assets which the note makers had agreed to pay*, and were collectible unless they were obtained by fraud. It is not our purpose now to discuss this view of the case. We shall recur to this case again when we come to discuss the question of fraud. Our purpose now is to show that the general principle that the "capital stock is a trust fund," has reference only to actual assets of the company, either paid in or existing in the shape of a valid agreement to pay, and that it has no necessary connection with questions of VALIDITY of AGREEMENTS to pay.

*Adler v. Milwaukee, &c., et al.*, 13 Wisconsin, 57–60, was a creditor's bill to reach unpaid subscriptions of stockholders. There seems to have been no defense in this case except want of jurisdiction. It was not denied that defendants had agreed to pay certain amounts by them subscribed and which they had not paid. The company itself could have collected the amounts.

The note makers were liable at common law on *these contracts* or "agreements to pay." They were not however *individually* liable *beyond* such contracts.

In *Sawyer v. Hoag*, 17 Wallace, 610, the only important question different from that decided in the cases referred to above, was the question of "payment." It was admitted that Sawyer had subscribed $5,000. He claimed that he had *paid this amount by giving a check for it.* He at the same time "borrowed" $4,250 of it back and gave his secured note therefor, and hence claimed to sustain the relation of a general creditor.

Mr. Justice Miller, delivering the opinion of the court, says: "The first and most important question to be decided in this "case is whether the indebtedness of the appellant to the In- "surance Company is to be treated for the purposes of this "suit as really based on a *loan of money* by the Company to "him, or as *representing his unpaid subscription.*"

The learned Judge comes to the conclusion that it was *not a payment.* The general principle that the "capital stock is a trust fund" and that the corporation company composed of its stockholders and directors elected by these stockholders, are trustees charged with the duty of preserving this fund for the benefit of its creditors, is used as the basis of an argument by which this conclusion is reached.

This case is not unlike the other cases referred to above, except as to the question of payment. Numerous cases might be cited to show the application of this general principle, but it is unnecessary. The current of modern authorities is quite uniform.

It is claimed in argument of plaintiff (page 24), that it follows as a logical deduction from this "general principle" that "no arrangement, agreement, device or artifice between the Company and its Stockholders, the effect of which is to deprive the creditors of this fund, is valid as against such creditors." If we understand the import of that statement, we do controvert it. Perhaps counsel mean to give it a broader application than we would be willing to concede? What is meant by arrangement, device, agreement or artifice "between the Company and its Stockholders"? Is it meant that if the Company uses some fraudulent device by which to induce an innocent party to subscribe to the capital stock, that creditors of the company are entitled to the benefit of this subscription under any and all circumstances? If such is the meaning, we dissent. If, however, it is meant, as we suppose, that a stockholder cannot make any arrangement with the company by which to pay

without giving anything of value, or to avoid payment or to derive an advantage over creditors by withdrawing his stock, this we do not controvert. The payment in *Sawyers vs. Hoag* was but a subterfuge. Sawyers was as much a party to it as the Company. It was "*an arrangement between them.*"

In *Slee vs. Bloom*, 19 Johnson, 477, the trustees resolved to pay in full discharge, 30 per cent. only of what they had subscribed. This would be a comfortable way of discharging that kind of obligations if it could be made a success. Bloom was a trustee and assisted in passing this resolution.

In *Man v. Cook*, 20 Conn., 188, the defendant having SUBSCRIBED for 40 shares of stock, made an arrangement AFTER THE COMPANY BECAME INSOLVENT, "between himself and the President" of the Company whereby he paid one-half on condition of being discharged from the other half—held a fraud on creditors and other subscribers.

In *Upton, assignee, vs. Hansbrough*, 3 Bissell, 417, the defendant was the holder of a number of shares on which there was a balance due of 80 per cent. unpaid. After this liability accrued, the Board of Directors of the Great Western Insurance Company passed a resolution in substance as follows, that "all persons having HERETOFORE subscribed to the capi-"tal stock of the Company shall be authorized to exchange the "existing issue of stock now in their possession for the new "form of the certificate." This "new form" of certificate was to be issued under a resolution of same date, to the effect that 20 per cent. was paid and endorsed on the certificate of stock * * shall be in full payment of the stock so issued, and that the words "NON ASSESSABLE" shall be printed across the face of every certificate of stock.

Mr. Hansbrough had exchanged his old certificate of stock for this new form, and in this way sought to pay his eighty per cent., for which he had been legally liable prior to these resolutions, not only to creditors, but to the Company itself. This

mode of payment is not distinguishable from the case of *Slee v. Bloom*, *supra*, and is wholly unlike the case at bar, where there was no agreement to pay the sum now claimed, and never was any completed contract to pay the eighty per cent. on any conditions.

True defendant did sign a subscription contract agreeing to pay the eighty per cent. "out of accumulation of profits," but this WAS SURRENDERED and CANCELED before final consummation of the contract, and when the note for $2,000 was given it was expressly stipulated that no more was to be paid. In Hansborough's case the certificate issued under the resolutions referred to, providing that the "eighty per cent. was payable out of future profits."

The certificate issued to defendant makes no reference to any eighty per cent. (See copy in transcript of record, page 40.) This we believe to be material, as bearing on another view of the case, and to which we shall refer before closing our argument.

In *Peychand v. Hood*, 23d La. Ann., 732, Hood had subscribed, but claimed as a defense that when he did so there was a "private agreement" between him and the President that he was not to pay anything. He subscribed for the influence his character gave the enterprise. Such a defense was, of course, unavailing, for the reason that he could not set up a parol contract against his written contract, and because such a contract was a fraud on other subscribers.

It could not avail as a defense at the suit of the Company, and of course not as to creditors.

*Nathan v. Whelock*, 9 Paige, 152. The Mohawk Insurance Company was organized under a peculiar statute, referred to in the decision.

The statute required the entire amount of stock to be subscribed and paid before business was commenced. The directors agreed among themselves to keep control of a majority of

the stock. Whelock and Brown were directors. To accomplish this it was agreed that the Company should "loan back" to each stockholder his payment. Whelock subscribed 1042 shares ($20 per share), giving his note for $20,840. The Company became insolvent. Whelock sold his stock to the President, Brown, known to Whelock to be insolvent, and took up his note.

The Court held this transaction to be a violation of Sec. 2 of the Act of April, 1825, Laws of 1825, page 448. This section is set out at length in the opinion, and is assigned as the SOLE ground of the decision. Doubtless it might have been decided in the same way on general common law principles. It certainly was an attempt to withdraw a portion of the capital stock before the debts were paid, and in principle is like *Curran vs. State of Arkansas, supra.* We have examined *Mangles vs. Grand Collier, &c.*, 10 Sim., 519, and also the case of *The Society of Practical Knowledge vs. Abbott, et al.*, 2 Bevan, 559, and have not been able to see their special bearing on the point they are cited to sustain.

In *Admiral Leek's case*, Law Rep., 11 Eq. 99, there was no payment at all.

Leek's agent, Blake, who, it seems, got up the enterprise induced the Company to allow him $10,000 in stock for "promoting" the enterprise, and then donated 50 shares to the Admiral. This was doubtless to get the Admiral's influence and give eclat to the new enterprise, but the payment was only a sham. It was in effect a donation of the shares by the Company and was a fraud on the other shareholders and creditors, and Leek by accepting the shares, knowing they were not paid for, made himself a party to the fraud.

*In re Disderi & Co.*, Law Rep. 11 Eq. 241, Disderi the "promoter" desired certain parties for directors. These parties were willing to lend him their personal influence but not to incur liability. They "subscribed" stock--25 shares, £10 per share--

on condition that he would pay the same and became duly registered as stockholders, and through their influence as directors got the Company to buy Disderi's interest in certain business (photograph business), agreeing to pay therefor £168,000 in paid up stock and £2000 in cash. This £2000 being the amount that Disderi would have to pay under his agreement for the stock of these persons. Eight checks, £250 each, were drawn by Disderi's agent, each one payable to one of these same directors. These checks indorsed by the director to whom payable were handed to the Company in payment of his stock. New checks were handed back to Disderi's agent in payment of this £2000.

This scheme was a palpable fraud and sham on all other subscribers and on creditors. These directors were not only a party to it, but the most culpable of the conspirators. It will be observed in this case that no contract could be made with Disderi and the Company till the board was organized.

These men could not organize till they became directors, and could not become directors under the statute till they subscribed 25 shares and registered as stockholders. Hence they subscribed and registered before the Company could make its agreement with Disderi. That is, they became indebted before the agreement by the Company to buy Disderi out and could not discharge this debt by a performance so palpably a sham to which they were active parties.

It will be seen by this review of the cases cited by counsel for plaintiff that in every instance the parties seeking to evade payment were parties to the agreement, arrangement, device or artifice relied on. That they were equally culpable with the Company or its agents with whom they acted, and were trying to reap the advantage of their own fraud, and that this is so is shown by the fact that it has been repeatedly held that subscribers might pay in property when done in good faith.

See *Drummond's case*, Law Rep., 4 Ch., P. 772. *Baron*

*DeBevill's case*, Law Rep., 7 Eq., 11. *Bell's case*, Law Rep., 5 Ch., P. 11.

***Defendant's Contract and its Interpretation.***

This is a suit upon an alleged contract. The defendant pleads that he did not make any contract agreeing to pay any portion of the sum sued for.

It is clear from the record, that he did not make any express contract nor any implied one unless it be such as is implied by law from the fact of his being in possession of the certificate of stock in evidence (see page 40, Transcript), and he certainly cannot be held on such implied contract unless it be on the ground that as to creditors he is estopped from denying that he "agreed to pay." We claim that defendant is not estopped from denying such contract. If we can maintain this position it will follow that even if the court below did err in its instructions to the jury on the question of fraud, it would be error without prejudice. If, however, our position is untenable what we propose to say on this point will have its bearing on the question of fraud to be discussed hereafter. Among the great number and variety of statutes creating, or authorizing by general provisions, the creation of limited companies, there are none that have come under our observation making a shareholder liable to pay more than he has *agreed with the Company to pay.*

In such companies he does not deal with the creditor. He deals only with the Company; neither the Company nor any of its members are his agents to contract for him with third persons. He is not a partner of the Company or the other shareholders. He is liable only for what *he* agrees to pay the Company.

Lord Cairns in *Smith vs. Reese River Mining Company*, Law Rep. 2 Ch., 610, says "with regard to companies established "under the act of 1862, there is no contract between the credi-

"tors of the Company and a shareholder. When the legisla-
"ture introduced the *principle of limited liability* it was abso-
"lutely necessary to give effect to that principle by setting up
"the Company and the Company alone as that with which the
"creditor or third person could contract."

See, also, *Steadman vs. Eveleth*, 6 Metc., in which Shaw, C. J., lays down the same doctrine.

Sometimes there are special provisions of these statutes declaring that certain acts of parties shall raise a presumption that such parties have contracted. There is no liability, however, in the absence of statutory provisions, and the foundation, as we apprehend in all cases is the "argreement express or implied to pay." Various provisions will be found in these statutes designed to enable these companies to provide means and the necessary public credit to carry on business.

The English act of 1862—under which many of the English cases referred to in plaintiff's argument, as also in this, were decided—to enable companies organized under it to raise funds, authorizes subscriptions to its capital stock, and to give it public credit, refers the public to the character *of its membership*. It was drawn with great care and skill and is very explicit and extensive in detail. Its chief feature is the numerous and explicit provisions designed to furnish public information as to the character and responsibility of its membership.

SEC. 6 declares that the memorandum of association shall contain the provision as to liability of members.

SEC. 7 provides that this memorandum shall contain a declaration by each member as to the amount he is to be liable for in case of "winding up," and it is to be signed by each member.

SEC. 14 provides that this memorandum of association thus signed, with each member's individual liability thus definitely fixed, together with the articles of association shall be deliv-

ered to the Register of Joint Stock Companies, a public officer duly provided for by law. After such delivery, and not before, the "Company" is incorporated and ready for business.

SEC. 25 requires the Company itself to keep a register of all its members in proper books in its principal place of business *subject to public inspection.*

This register is very full. It contains the name and residence of each member, number of shares subscribed by him, amount paid or agreed to be paid, date when entered on register as member, date when such person ceased to be a member.

SEC. 26 requires annual lists to be made out including items referred to in Sec. 25, also amount of capital stock, number of all shares taken, amount of calls made, calls received, amount unpaid, amount forfeited, names, occupations and residence of persons having ceased to be members since last list. This is to be entered in a separate part of the Company's register and a copy sent to the public register subject to public inspection.

Sec. 174 provides for a Public Register's office, and makes all documents kept therein subject to public inspection; and other sections provide for furnishing copies at nominal rates to applicants. Sections 11, 16, 18, 23, 35, 38, 74 and 82 refer to liability of members. They, in substance, define "membership" to be those who have subscribed the memorandum; also, any other person who has agreed to become a member, and whose name is entered on the register of members, and declares that members are CONCLUSIVELY bound by the memorandum and articles of association.

We have referred quite fully to this English act because we wish to contrast it with the Illinois statute referred to by plaintiff, and also because these statutes have a very important bearing on the English decisions cited in argument.

The Illinois statute (see Gross' Statutes of Illinois, Chapter

52, page 252), as will be seen by reference to it, adopts an entirely different method of inviting public confidence to this class of companies. The means of raising funds is much the same, but the basis of public credit is wholly different.

There is no provision for a stock register, or for a memorandum of association to be furnished, recorded or filed in any office or place. There is no provision for subjecting any of the records of the company to public inspection. There is not even a provision requiring a simple list of stockholders' names to be furnished in the company's office, or elsewhere.

Section 21, however, provides that it shall be the duty of the President, or Vice-President, and Secretary of each company, annually, on the first Monday of each year, to prepare, on oath, and deposit in the office of the Auditor of Public Accounts, a statement of the condition of such company on the 31st day of December then next preceding, exhibiting the following facts and items, namely :

"*First. The amount of capital stock of the company actually paid in.*

*Second.* The property or assets of the company, specifying: 1st, the value, or as near as may be, of the real estate held by such company. 2d, the amount of cash on hand or deposited in banks to the credit of the company, specifying in what banks the same is deposited. 3d, the amount of cash in the hands of agents, and in course of transmission. 4th, the amount of loans secured by mortgage and bonds, constituting a first lien on real estate, on which there shall be less than one year's interest due or owing. 5th, amount of loans on which interest shall not have been paid within one year previous to such statement. 6th, the amount due the company on which judgments have been obtained. 7th, the amount of stocks of this State, of the United States, of any incorporated city of this State, and of any other stocks owned by the company, specifying the amount and number of shares, and par and market

value of each kind of stock. 8th, the amount of stocks held thereby as collateral security for loans, with the amount loaned on each kind of stock, its par value, and the market value. 9th, the amount of assessment on stock or premium notes paid and unpaid, specifying each. 10th, the amount of interest actually due and unpaid. 11th, the amount of premium notes on hand on which policies are issued. 12th, the amount of installment notes on hand on which policies are issued."

*Third.* "The losses," which we need not enumerate.

"*Fourth.* Income of the company during the preceding year, specifying: 1st, amount of cash premiums received. 2d, amount of notes for premiums. 3d, amount of interest money received. 4th, amount of income received from other sources."

*Fifth.* "Expenditures," which we need not enumerate.

It will be seen that there is no reference to stockholders, their names, residences, amount of subscriptions, not *even* a statement showing *amount of stock notes* or *subscription contracts of any kind.*

There is nothing in this statement except what relates to the *actual assets* and *property in the hands of the company.* The amount of "cash actually paid in," real estate, cash in banks, in hands of agents for transmission, cash loans, stocks, etc. This the public is invited to examine before giving its confidence. The Auditor is required to provide the necessary blanks, and is given a kind of supervisory control over such companies. (See same Section, last sub-division; also, Sec. 23.) The information thus aequired by the Auditor is constantly accessable to the public. The records are open for inspection, certified copies can be had, and a tabulated statement of the facts furnished in such reports is to be printed as part of the Auditor's report.

Even the mode of investing such assets as the company is required to report is determined by this statute. Section 8 provides for investing the company funds, and guards carefully

against any injudicious investments. Section 9 forbids investment in certain matters. Section 10 sets forth certain additional duties of the Auditor, and among other things provides that this officer, or persons appointed by him for that purpose, shall enquire into the affairs of a *proposed* company, and certify under oath that the *capital required by the act has been paid in* and *is possessed* by it in money, and in such stock, bonds, etc., as is specified in Section 8, before business is commenced. Considering this entire statute, it indicates, as we believe, a purpose on the part of the Legislature to invite the public, in dealing with companies organized under it, to rely on the *funds* provided for, protected, and reported, just as clearly as the English statute invites the public to trust the shareholders in companies organized under that act.

If we can successfully maintain the position, and we doubt not we can, that the public deal with the Company and not with the shareholders, that the shareholders contract with the Company and not with the public, and that the public trust certain funds and not each individual stockholder; then it follows as a necessary conclusion that there is no such thing as an estoppel between this public and a shareholder, and as a corrolary that defendant in the case at bar is not estopped as between him and a creditor from setting up the real contract made, and from claiming that he subscribed $2000 and not $10,000. This case is wholly unlike *Peanchand v. Hood*, 23 La. Ann., 732, cited by counsel for plaintiff. Hood did agree, in writing, to pay the whole amount sued for, but claimed as a defense the benefit of a secret contemporaneous parol agreement that he was *not to pay*. In the case at bar there was no agreement to pay more than the $2000. Certainly as between defendant and the Company, he could not have been compelled to pay more.

If the Company had no authority to issue such stock, "non-assessable," and sell it for 20 per cent. of its par value, then

there was no legal contract at all. That was the only contract attempted to be made.

The remedy would be to annul it—not to seek to enforce a contract not made. It is assumed in argument for plaintiff that the 16th section of the act referred to, Chapter 52, Gross' Statutes, imposed individual liability on shareholders in an amount equal to the par value of the stock by him held, and that the certificate held by defendant, whether authorized by law or not, had an effect to fix his liability just the same as if he had agreed to pay $10,000 and given his notes therefor and got a certificate in the usual form. This certainly admits of a doubt. The section reads as follows:

"The trustees and corporators of any Company organized "under this act shall be severally liable for all debts and "responsibilities of such Company TO THE AMOUNT BY HIM or "them SUBSCRIBED until the whole amount of the CAPITAL shall "have been paid in and a certificate thereof recorded as hereto "fore provided."

This statute differs from most American statutes, on similar subjects, and so far as we know, from the English statutes. It does not, in terms, as many statutes do, render the *holder of a certificate of stock liable for the par value of the stock represented by the certificate* less payments. It simply makes him liable for what he *subscribes*. That is, what he *agrees to pay*. Certainly the section will bear this interpretation, and such interpretation is in harmony with those portions of the statute heretofore referred to, inviting the public attention to certain *funds* and not to stockholders as their means of security.

"The word 'stock' or 'capital,' as applied to corporations, "means the property and franchises." Justice Seldin, in *Burr v. Wilcox*, 22d N. Y., 355.

"The certificate is not stock. * * It is simply a written "acknowledgment by the company of the interest of the sub-"scriber in its property and franchises, * * is evidence of

"his rights," as between him and the company. Same authority last cited.

To *subscribe* is to make an agreement to pay. "A subscrip-"tion for stock in a company is a contract." Angell on Corp., 9 ed., § 517. In the *Thames Tunnel Company v. Shelton*, 6th Barnwell & Cresswell, 341, the King's Bench held the term, "subscriber," used in a statute somewhat similar to the one under discussion, to mean one "*who agreed to pay.*"

If these definitions be correct, then there is nothing in Section 16 making a corporator liable *as a shareholder* (*i. e.*, liable to the extent of the certificate of stock held by him,) but only as a *subscriber*, "one who agrees to pay" "the amount by him * * subscribed." It may be asked, what then was the object of this statute? It may have been to make this "amount by him subscribed" assessable. A subscription is not liable to assessment by the company except pursuant to contract or statute. Angell on Corp., § 544. Also, to make him liable directly and "severally" to creditors. To say that the terms in the statute, "amount by him subscribed," mean "amount equal to the par value of the stock as represented by the certificate held," would be to interpret the statute as a penal statute, which will not be done unless the terms clearly require such interpretation. SHAW, C. J., in delivering judgment in *Gray v. Coffin, et al.*, 9 Cush., 192, said: "To create "individual liability of members for debts of a corporation, a "body politic, created by law, and regarded as a legal being, "distinct from that of all the members composing it, and cap-"able of contracting and being contracted with as a person, is "a wide departure from established rules of law, founded in "considerations of public policy, and depending *solely* upon "provisions of positive law. It is, therefore, to be construed "strictly, and not extended beyond the limits to which it is "plainly carried by such provisions of statute." See, also, 1 Parsons on Contracts, 143. *Shaw vs. Boylan*, 16 Ind., 384.

Though the liability is statutory, yet there can be no liability without consent. If he did not agree, or if his agreement was obtained by fraud, he is not bound, even under the statute, for the statute, of course, contemplates a consent before liability attaches. See *Oaks vs. Turquand*, Law Rep., 2 H. L., 351.

"It is not the mere fact that his name is on the register which "makes him liable as a member of the Company. If he has "not agreed to become a member, he cannot be made contrib-"utory." See *Chapman & Parks' case*, L. Rep., 3 Eq., 365. *Webster's case*, L. Rep., 2 Eq., 741. *Stewart's case*, L. Rep., 1 Ch., 574.

### *The Defense of Fraud.*

This brings us to the discussion of the defense of fraud and the instructions given by the court to the jury.

Plaintiff in opening this discussion says, (page 24, argument) "it is conceded in the evidence * * that the defend-"ant in this case had become a stockholder in the Great West-"ern Insurance Company." This we deny. It *is* conceded that he had a paper purporting on its face to have been issued by this Company and which was in fact issued by this Company, but we have constantly denied that he ever became a stockholder in this company, for 100 shares of stock at $100 per share. As to the *form* of this paper and whether the Company had power to issue it, it is not our purpose now to enquire. "The theory on which the court gave its instructions" will be best seen from the instructions themselves.

The argument of plaintiff further states: (same page) "The first 'answer' defendant makes * * is that he never intended to pay it and that he contracted in the beginning that he would not pay unless the venture proved a profitable one and it could be realized out of the profits accruing by way of dividends."

The court will look in vain for any such "answer." It is not in the record. True, defendant did sign a subscription contract agreeing to pay 20 per cent., balance to be paid out of profits, &c., but this paper was left with the agent upon an agreement that it was not then to be delivered to the Branch Company, the only company then talked of, till the hapening of certain events, and before it was delivered there was a new contract made and this subscription contract, the only paper that said anything about paying by accruing profits was surrendered and canceled, is not now and never was the property of the Great Western Insurance Company.

Learned counsel then proceed to make an apology for the executive committee in relation to their scheme of "non-assessable" stock. They say: "This transaction * * may have two interpretations; 1st. That they intended by providing that the stock should be non-asse-sable to assure the subscribers that they would cease business whenever their capital became so impaired as to require more than 20 per cent. of the stock subscribed in order to continue business and that they intended this as a restriction on the power of the board to assess the stock beyond that amount," and then in substance concludes that it was only designed as a limitation on the power of the board and not designed as an assurance that defendant and others who were asked to subscribe would never have any more to pay in any event. A complete refutation of this "interpretation" is a simple reading of the record got up by this same executive committee. Here it is, taken from page 45, transcript:

"A communication was read from the President and Secre-
"tary * * stating that the agents * * * were
"unable to sell the stock as the certificates were then being
"issued with 20 per cent. paid, for the reason that those con-
"templating the purchase of stock *were afraid* of being
"made liable for eighty per cent. more, notwithstanding the

"assurance of our agents that the 20 per cent. paid was *all* "*they would ever have to pay.* Dr. Sherman * * (agent) "stated to the committee that from his *experience in endeavor-* "*ing to* sell the stock he was satisfied in his own mind that "it could *not be placed* while the question of liability was left "open, as it *seemed to many people indefinite*, notwithstand- "ing the assurance that 20 *per cent. would be all that they* "*would ever have to pay.*"

Then followed the resolution that "20 *per cent. paid* * * "*shall be in full payment of the stock so issued* and that the "words 'non assessable' shall be printed across the face of "every certificate."

In the face of this record what becomes of the charitable intepretation given by counsel to the conduct of this committee? This conduct was not simply the conduct of the committee but of the Company, for the Company had by its by-law No. 12, clothed this committee with power to "*supervise the placing of stock and extending* the business of the Company." Transcript p. 30, folio 67, 68. It was the mouth piece of the Company; when it spoke the Company spoke; when it "resolved" the Company resolved.

2d. Another "interpretation" suggested by learned counsel is that the committee intended a deliberate fraud on creditors and intended to put all "their stock subscriptions in such shape that if the enterprise proved profitable they could pay their 80 per cent. and if not profitable they could avoid liability." This interpretation is not very complimentary to the intelligence of these Insurance men by counsel's own confession. They, on the same page, (25), settle it conclusively "that no business man, much less a lawyer, could ever have thought that this scheme of making stock 'non-assessable' * could ever have been a shield against the rights of creditors.

So neither of these interpretations will do. The first is refuted by the committee's own record, the second condemned by

counsel as stupid. It is easy enough however, to understand the real motives of the committee.

But little of the evidence before the court below as to the motives of the committee has been certified to this court, but there is enough for our purpose just now. The real purpose of the committee was to enable their agents to "place the stock." This the record already referred to and partially quoted shows. There was nothing else suggested in the "President's communication" to the committee. Nothing else in Dr. Sherman's report. The burden of their story was the stock will not sell. "Many people" are "afraid" of being liable for more than the 20 per cent., agents' assurance of no avail, experience satisfied the Dr. something must be done. This something was done. Desperate means had to be used, and the committee were equal to the occasion. It is simply a waste of time to hunt up any explanation as to the motives of this committee. It was a determined purpose to *place this stock* by some means or other. A record must be gotten up and placed in the hands of the agents and their mouths filled with base falsehoods and they sent into remote rural regions on their mission of villainy. These men neither knew nor cared to know what their resolutions amounted to. It is true as suggested by counsel, that the qualification at the close of this certificate (page 40 Transcript) "being subject to the Charter and By-Laws of the Company and laws of the State of Illinois" might have been designed to preserve the liability of subscribers, notwithstanding the resolutions, the words "non assessable" and the repeated assurance of agents.

If so, it was not much credit to the committee; if such a purpose had existed it should have been declared as explanatory of the words "non assessable" and the resolution, copies of which every agent had. It is more probable that this qualification was inserted to enable them to explain, in case of legal proceedings by the Attorney General, to set aside their articles

of incorporation, or to enable them after the resolutions had accomplished their purpose to make assessments notwithstanding such resolutions, the form of their stock certificates and the assurance of agents. But it is perhaps for the purposes of the questions to be determined by this court not very material about the motives or conduct of this committee. The sole questions for the determination of this court grew out of alleged misdirections of the Judge trying the case, and the evidence cited in the record is material only as showing the applicability of instructions given. We should regret if any questions of fact were to be considered, as the evidence certified in the bill of exceptions presents but a faint view of what was before the court and jury and upon a careful examination of the same we find that that view is quite partial. Of this we do not complain as it was overlooked in the hurry of preparing the same. Yet it evidently reflects largely the impressions of the counsel who tried the case for plaintiff. But as the case is to be determined purely on questions of law we presume our interest will not be affected by this feature of the record.

### *Instructions Given.*

Was there error in the instructions given. To this question we will now especially address ourselves. It is objected that misrepresentations as to the charter of the company, and the Laws of Illinois and the powers of the company under such charter and laws could not constitute fraud, and it is claimed that the only pretended fraudulent representations was about this charter and Laws of Illinois. "The only evidence of fraud," says plaintiff's counsel, argument page 26, "*in all this matter* of misrepresentation is that no such law existed in the State of Illinois." This statement was certainly made without due reflection. If it were true that this was the only

evidence disclosed by the record, it would not follow that it was the only evidence before the jury. The record does not contain, or purport to contain *all the evidence.* In fact it does not purport to contain any of the oral evidence, only such general facts as the evidence tended to prove, which in the judgment of counsel for plaintiff were essential in showing the materiality of instructions given. The learned Judge who instructed the jury, did not undertake to recite all the facts in the instructions given. The record before this court, meager as it is, establishes this fact. For example: Defendant testified that in June, 1871, at the office of the company in Chicago, he demanded his note and mortgage, and tendered back his stock. Transcript of Record, page 36, folio 78.

If plaintiff desires to rely on such a point, it seems to us he should have had the entire evidence certified and made part of the record. But the record as it is refutes the statement. The representations or misrepresentations that the charter of the company and the Laws of Illinois, allowed the company to sell its stock at 20 per cent., as fully paid up was only an *incident* to the real artifices, and falsehoods used to commit this fraud. There was the false statement as to the organization of a branch company to be composed of Davis county men and friends of defendant, and which was to be independent and was to control the branch business. There was the subscription contract, with its deceptive conditions about paying the 80 per cent. in profits. There were the repeated assurances of the agents Long and Overton, that they were selling the stock at 20 per cent. fully paid up. There was the certificate of stock with its artful and decepive form and phraseology. All these varied and ingenious falsehoods, and deceptive artifices were doubtless brought to bear on the mind of defendant, before anything was said about Illinois law. *They were facts.* They were not statements about law, either as to its existence or its interpretation. They were

present facts. Here was the subscription contract and the certificate in writing as exhibited to defendant? Here were the "assurances" which Dr. Sherman in his report to the committee spoke of. It is fair to presume that no suggestion was made by Long or Overton, about the power of the company to issue such stock till defendant asked some questions about it.

The agents were adepts; men capable of concocting such a scheme, would not send out fools to execute it. It would readily occur to Long that nothing should be said about *power*, unless defendant inquired about it. It is an exhibition of the highest talent in the art of fraud to assume that everything is right, and go ahead boldly, being ready, however, with proper address to allay any apprehensions that might arise. In the absence of any showing as to how it happened that the power of the company was discussed, it is fair to assume that this was an answer to suggestions of defendant on this point. When they were made, Long, and Overton speaking as the mouth-piece of Long, were ready to say the Laws of Illinois allowed it, and to clinch the assertion with a statement that ought to allay all apprehensions, that *able lawyers* of Chicago had investigated these matters, and it was all right.

The assertion that the laws of Illinois conferred such power on the company was really no part of the scheme of fraud, but was simply an assertion to allay fears, if any should exist.

This statement was not the *means* used to defraud defendant. It was only a falsehood used to allay apprehensions, such as might, if not allayed, defeat *the means* used. We suggest another view in which we think there may be some weight. If this evidence was incompetent, why not object to it when offered, or move its withdrawal from the jury afterwards. There is scarcely a doubt but that the verdict would have been the same had this evidence not gone to the jury.

Can plaintiff allow it to go to the jury with a mass of other evidence on the same point, and then ask a reversal of the case on the ground that it was incompetent evidence? There is another thought worthy of consideration. The false statement about the law was not as to its INTERPRETATION, but as to its *existence*. These agents did not have any Illinois statute present, did not have defendant read it, or read it themselves to him, and then give a fraudulent interpretation as to its meaning and effect.

The assertion was that under the laws of Illinois the company had this power. No particular law was spoken of. Defendant of course supposed that these agents meant that there was a statute authorizing it. There was no suggestion as to doubts or difficulties about the meaning of any statute. The agents meant to convey the idea that there was such a law; that there was no doubt about this, because Chicago lawyers said so.

Even if the false statement was with reference to a law, and nothing else, we think it would make no difference. This was a foreign law, and defendant was not presumed to know of its existence, nor of its legal effect. Foreign laws must be proved even in our courts. Greenleaf, Sec. 486. The States are foreign as to each other. 1 Greenleaf, Secs. 489–504; *Mills v. Duree*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheaton, 234; *Brackett v. Norton*, 4 Conn., 517; *Packard v. Hill*, 2 Wend., 411. If the courts will not take judicial notice of a foreign law, *a fortiori* a citizen will not be presumed to know them. We have no controversy with counsel as to the doctrines laid down in Kerr on Frauds, *Platt v. Scott*, *Russell v. Branham*, *Shaw and others v. Bennett*, *Fish v. Cleland and wife*, *Clemens v. New Dan. R. R. Co.*, and *Merton v. Wheaton*, cited by them. We concede that the citizen is bound to know the laws of his government, and the "interpretation thereof," and that when

he signs a contract, being fully advised as to what is in it, he is presumed to know what it means.

It is, however, insisted that defendant being a stockholder in the Great Western Insurance Company, was bound to know the law of its organization. There are some *facts* material to be considered in connection with this point, and we beg leave to remind the court that defendant in his answer denies that he ever signed any stock book or register of the Great Western Insurance Comyany, or authorized any other person to do so for him. That he ever had anything, in fact, to do with it till after his note was found in Chicago, 1871, when he sent an agent to Chicago to tender back his stock and demand his note. That he never met with its stockholders, or was in any way connected with its affairs. There is nothing in the record in this case to show that he was ever nearer to Chicago than Bloomfield, Iowa, till in June, 1871. Does the fact that he had in his possession the certificate referred to raise a *conclusive presumption* that he knew all about the charter of the Company and the General Laws of Illinois governing such companies? On this point we wish to quote from the opinion of Lord Cranworth in the case of the *Central Railroad Company of Venezuela vs. Kish*, Law Report, 2 H. L., 99, (English and Irish Appeals):

The defendant had taken stock in a company organized under the Act of 1862, and claimed that he had been defrauded because of a discrepancy between the prospectus and memorandum of association and articles. He had acted on the faith of the prospectus. It was, however, urged that he, being a stockholder, was bound to know the contents of the memorandum of association and articles. It was urged in that case, as in the case at bar, that the law raised this presumption and that it was *conclusive*, especially under the statute of 1862.

Lord Cranworth says (page 123):

"If, when the defendant took the shares, he is to be deemed "to have had notice of what is so contained in the articles of "association, the argument of appellant is unanswerable. I "am of the opinion no such notice is to be imputed to him. "(His Lordship having quoted section 16, Acts of 1862, con- "tinues.) If he actually signed and sealed these articles, he "certainly could not allege want of notice; * * *he never "did subscribe* and *seal them*. * * All that he did was to "act on the *faith of the prospectus*, and if the *prospectus* "*stated what was untrue*, he is entitled to treat all which he "did * * as absolutely void. * * The statute only "meant to bind those who had actually became members. "Any one who, *without fraud*, had taken shares, could not "allege ignorance of anything contained in the memorandum "of association merely because he had not signed and sealed "them, nor had notice of what they contained. The statute "cannot be taken to impute knowledge of its contents so as to "protect those who, by fraud, had induced him to do that "which, in the absence of fraud, would have precluded him "from saying he was ignorant. The case of respondent is that "he never was a member, for that he was induced to take "shares by fraudulent representations, which entitled him to "repudiate and treat as null all which he was so induced to "do."

We regard this opinion as being in point and as justly entitled to great weight, being a decision made under the act of 1862, which declares among other things that any person who has agreed to take stock, and whose name is on the register is a member, and that members are conclusively bound by the memorandum of association and articles. Wright's case cited by counsel for plaintiff, on another point, is authority on the point now being discussed. See Law Report, 12 Eq. 330. Also Law Rep. 7 Ch., 55. Mr. Wright claimed that he had been defrauded because of a variance between the pros-

pectus and memorandum of association, and that he had not seen the memorandum, and did not learn of the fraud till after insolvency.

His defense held good. This was not the main point of his defense but it was a material fact. See also *Smith's case*, Law Rep. 2 Ch., 603.

The Reese River Mining Company was registered June, 1865, by "a Mr. Jones," of Nevada, U. S. Mr. Smith subscribed 100 shares of stock. The shares were allotted. Smith paid the required amount, 50£ and was registered 2d of August, 1865. In January 1866, he was informed of the false statements in the prospectus, and on February 6th, 1866, filed a bill to be released from his shares. In April 1866, proceedings were instituted to wind up the company. Mr. Smith applied to have his name removed from the list of contributors.

Sir. G. J. Turner, L. J., said:

"As I understand the case, if it can be shown that a mate-"rial misrepresentation is contained in the prospectus, *or in* "*any other document forming the foundation of the contract* "between the company and the shareholder, and the share-"holder comes within a reasonable time, and under proper "circumstances to be released from his contract, the courts are "bound to release him. The case I think goes to that extent "according to the opinion of Lord Romily himself, that con-"tracts of this description between an individual and a com-"pany, so far as misrepresentation or suppression of the truth "are concerned, are to be treated like contracts between indi-"viduals."

There is no suggestion here that shareholders are bound to know the contents of the documents forming the foundation of the contract. Just the reverse.

This decision was made under the act of 1862, and in face of its declarations that persons who had subscribed and been "registered" were conclusively bound. It was made against

the claims of creditors. True Mr Smith had applied to be released from his shares, but no action of the court had been taken, and the company was then in failing condition. Smith's name was on the register in August prior, and doubtless all or nearly all the debts of the company were contracted while his name was there. The filing of his petition in February could not possibly amount to more than an explicit declaration of his desire to repudiate his contract; no more than the demand made by the defendant in the case at bar for his note, and the tender of his certificate. See also *Ship's case*, Law Rep. 3, H. L. 343. Ship applied for shares in May, 1864, and deposited 50£ acting on the statements in the prospectus. In June the memorandum of association was registered *greatly enlarging* the purposes of the enterprise as stated in the prospectus. Ship's shares were allotted June 1st, 1864. In December, 1864, company went into liquidation, Prince appointed official liquidator. In January, 1865, Ship moved to have his name removed from the list of contributors.

Lord Cranworth, in presenting his views to the House of Lords, where it was tried on appeal, after declaring that it was no part of a shareholder's duty in limited companies to look after the affairs of the company, says that "if shareholders sub-"scribe before the memorandum of association has been reg-"istered, and *abstain* from examining it after its registration, "the court ought to be slow in giving relief under section 35, "Companies Act 1862."

So Lord Chelmsford declared that by section 11 of the act, the memorandum of the association was as binding on each member as if he had signed and sealed it.

He declares that under this section, members must with proper haste acquaint themselves with the act, and if they neglect to do so they cannot afterwards complain.

We refer to these opinions as showing, first, that the English decisions turn greatly on the provisions of the Act of 1862, and secondly, on the question of *diligence*.

For it will be seen that in this, and as we believe, in every English case involving such questions, the decision, if against the shareholder, is put on the ground of acquiescence, and not of *absolute legal presumption*.

In causes where parties subscribe BEFORE the memorandum is filed, it is said that it becomes the duty of such persons to inform themselves in a *reasonable time* of its contents; so it became a question of diligence, and not of absolute presumption of law, even under this very stringent statute, proceeding as it does upon the theory that public credit is given to the membership, as exhibited by the "memorandum of association," and Register, Public and Private.

In the *Lawrence case*, Law Reports, 2 Ch. Appeals, 412, it was said by Lord Cairns that Lawrence had a *reasonable time* after the registration of the memorandum of association to acquaint himself with it. Lawrence was defeated because it was shown that he had known the fraud for nearly *five months* before complaining.

Lord Romily, in *McNeil's case*, page 505, Law Rep., 10 Eq., said:

"It is very necessary in these cases not only to prevent a "contributor from 'playing fast and loose,' but also to prevent "the company from 'playing fast and loose,' and as the com-"pany alone has the control over the Register, and over the "returns it has got to make to the 'Register of Joint Stock "Companies.' I do not think that DOCUMENTS WHICH THEY "HOLD in their OWN HANDS can be held *conclusive against a "coutributor*, who in other respects has done what is fit and "proper in the matter. I think the question may *fairly* and "*properly be tried by putting it as a question of acquies-"cence.*"

Then after alluding to the fact that McNeil waited at the instance of the company till other suits, involving the validity of shares taken under similar circumstances, were determined, his Lordship concludes by saying, he "regards this as no waiver or acquiescence."

### *Fraud as a Defense Against Creditors.*

It is further insisted that even if there was fraud proved by legal evidence, that defendant cannot plead it as against *a creditor.*

It has not been claimed by plaintiff that a shareholder as between himself and the Company, could not, at the proper time, avail himself of any fraud by which he had been induced to subscribe. It is said that he cannot limit his liability by contract between him and the Company, (pages 32 and 33, argument). Certainly not. He cannot contract to do a thing and at the same time contract not to do it. But it fails to reach the point we make. We say that there was no binding contract made. Further, the only contract made by defendant was tainted with fraud, and that he repudiated it in a proper manner, and in due time, and that this is a good defense against any and every person claiming the benefit of this contract, that such contract is voidable, and when defendant repudiated it, it then became void as to the whole world. *Smith's case*, Law Report, 2nd Ch., 603, already referred to for another purpose, is a case where a shareholder was permitted against creditors to set up fraud as a defense.

The very point now made by plaintiff in the case at bar was "*very much pressed*" on the court in *Smith's case;* see page 615. But Lord Cairns, in answer, said—after admitting that the doctrine contended for by the liquidator would be good as applicable to unincorporated companies or partnerships: "It is not applicable to limited companies for the rea-
"son that in unincorporated companies and partnerships there
"is * * a direct contract between the indivduals and the
"criditor, * * but with regard to companies established
"under the Act of 1862 (there is) no contract whatever be-
"tween a creditor and a shareholder. The contract is between
"the creditor and the company. * * There is no doubt
"but that creditors' contract with one of these limited com-
"pannies with reference to and possibly after consulting the
"list of shareholders, and may be influenced considerably by

"their knowledge of who are shareholders, * * therefore "I apprehend it is that the court has always held, that if an "individual has allowed his name to be put on the list of "shareholders by a contract, which is between him and the "company *valid*, he cannot be allowed to withdraw from the "consequences of that contract as regards the payment of his "calls *by any collateral agreement limiting his liability.* * "It is quite a different matter when the question is whether "the individual ever did assent, by a contract valid in law, to "have his name on the list of shareholders. This is, no boubt, "a risk which creditors must take. It is one of those risks "which creditors are liable to in dealing with limited compa- "nies, that it may turn out that some person whose name has "been entered on the list as a shareholder, has a right to have "it taken off the list, if he can prove that it has been fraudu- "lently inserted there, and if he comes with promptitude to "have the fraud redressed."

This Company was organized June 5, 1865. Smith was registered Aug. 2, 1865; filed his bill February, 1866. Nothing was done but to file his bill, and in April afterwards the Company went into liquidation. This is what his Lordship means by "promptitude."

See *McNeil's case*, Law Rep., 10 Eq. 505, already cited on another point. The "Estates Investment Company" was registered under Companies Act of 1862, February 15, 1865. McNeil, on the faith of the *prospectus*, applied for shares, and paid the usual deposit. *Shares allotted in May*, 1865, and McNeil's *name placed on register*. Shortly after the allotment McNeil became aware that the prospectus contained false statements. He went to the office of the company and saw the Secretary and "repudiated" his shares; that is, said he wanted to be released. In July, 1865, in a meeting of directors, he said the same thing in substance. Other allotments had been repudiated, and suit was instituted by the company against the repudiators. There was a combination among some of the shareholders to resist payment, but McNeil was not a party to it, nor was he sued; but at the

suggestion of the company, that it would not institute any other proceedings till the suits already commenced had been determined, McNeil waited, doing nothing whatever. In the mean time the company became insolvent, and McNeil moved to have his name taken from the list of shareholders. This was done. Judgment by Lord Romily.

This is certainly a very much stronger case in favor of creditors than the case at bar. The vast difference between the English act and statute of Illinois cannot be ignored in the consideration of the case at bar. McNeil knew of the fraud *for months* before the insolvency of the company.

He did nothing, except say to the company officers he would no longer be bound. This was treated by that eminent jurist, Lord Romily, as a sufficient "repudiation." True, it was done at the instance of the company, but how could that be any particular advantage to creditors? If the creditors had rights as between them and McNeil, the company could not barter those rights away.

If it was necessary for McNeil, as between him and creditors, to discover the fraud at once and commence a proceeding to get released from his shares, then the company could not by any suggestion or agreement release McNeil from his obligation to the creditors.

We invite the careful attention of the court to this case. See also, Wright's case, 12 Eq., 330; Law Rep., 7 Ch. Appeals, 55. *Oakes* v. *Turquand, et al.*, Law Rep., 2 H. L., 395, is cited by plaintiff. This is the strongest case we have found against the claim we are making. It will, however, be observed that none of the learned judges whose opinions are given, put their conclusions on the ground that as between Oakes and his creditors, he is estoped from denying his liability. So far as there was any opinion expressed it was conceded that the contract, if procured by fraud, was VOIDABLE. And just so far as there are any views expressed tending to the extreme views maintained by plaintiff in the case at bar, those views are BASED WHOLLY on the provision of the act of 1862. The very sections are pointed out and commented on.

Lord Craworth, page 336, refers to the fact that the Register is by law made public, and says "this strongly indicates that "the creditors were to look to this document."

Lord Chelmsford says, page 350, "the liability is statutory, "not by contract"—says "members *cannot* be liable by sim- "ply having their names registered."

Lord Colonsay also says, "the liability of a shareholder is "statutory," (page 376.) Refers to the statute of 1862 as controlling. Refers to Smith's case, and distinguishes it from Oakes' case on the ground that Smith filed a bill to get released from his share BEFORE the "winding up proceedings" were commenced. That is, Smith did an act that amounted to a repudiation. McNeil did the same, but it was not the filing of a bill; it was simply a declaration that he wanted to be released. So in the case at bar. Defendant "repudiated."

### *Repudiation by Defendant.*

Did defendant sufficiently repudiate? For the purpose of discussing this question we shall assume that there was a fraud, and this the jury found. That such fraud made the contract voidable even as against creditors. In that state of the case we admit that defendant, when he discovered the fraud, would have to repudiate within a reasonable time, or else he waived it.

Such were the views of the court below. The learned judge instructed the jury that "as respects creditors, the law re- "quires of one who has been drawn by fraud into the pur- "chase of stock, that he shall be guilty of no negligence or "want of reasonable care in discovering the fraud, and on "discovering it promptly repudiating the purchase. If you "find from the evidence that within a few months after re- "ceiving the stock certificate, the defendant discovering that "he had been deceived in *some respects*, procured the agent "who had obtained his certificate to go to Chicago, delivering "to such agent his stock certificate, and instructed the agent "to surrender up the stock and demand back the note for the

"twenty per cent.; and if the agent accordingly went to Chi-
"cago and offered to the company to surrender the stock and
"rescind the contract which the company refused and if you
"find that the defendant never afterwards acquiesced in being
"a member of the company; that in September, 1871, he
"brought an action of replevin for the note, based on the
"ground of fraud; and if afterwards he refused to receive any
"dividend; and if all this took place before bankruptcy or in-
"solvency of the company, I instruct that in point of law this
"is a sufficient repudiation of the contract to become a stock-
"holder, to enable defendant living in another State to resist
"an action for the payment of the eighty per cent., provided
"you find that defendant was induced to become a stockholder
"by fraud, as before explained; and also further find in view
"of all the circumstances that defendant was not unreasona-
"bly negligent in discovering the fraud, and was guilty of no
"want of reasonable diligence in taking steps to repudiate the
"transaction."

It would seem that there could be no possible objection to these instructions, and that they are as favorable to plaintiffs as they could have been put by Lords Cranworth, Cairns or Romily, under the company's acts of 1862.

We venture to assert, that not a case can be found where the common law prevails, not even in England, under the act of 1862, where the law is given more favorably for plaintiff. It lays down the rule that such a contract if induced by frauds, is "voidable" at the instance of the injured party, but says it is his duty to use diligence in discovering, and promptitude in repudiating, and that if he does so *before* the insolvency of the company, that being guilty of no negligence, never having received and refusing to receive any benefits from the company, he can plead this fraud even against creditors. In *Oakes' case*, Law Rep. 2, H. L. 325, cited by counsel for plaintiff, and containing more extreme views than we have found elsewhere, emanating from a respectable tribunal, there is nothing to contravene these instructions.

Lord Chelmsford said, (See page 345,) that the contract was

not "void, only voidable" at the instance of Oakes, and concluded that under the facts of this case, and the acts of 1862, to which he expressly attached great importance, as Oakes had not repudiated the contract until *after bankruptcy*, the contract still existed; that Oakes was still a member, and by the terms of the Act of 1862, bound as a contributor. Lord Colonsay, evidently entertained the same view, for he distinguished between Oakes' case and Smith's, by saying Mr. Smith had repudiated *before* bankruptcy.

It is however insisted that there was *no repudiation until after bankrnptcy* in the case at bar. We do not admit, that under the Illinois Statute, repudiation before bankruptcy was necessary. If defendant knew or might have known by reasonable exertions, that he had been defrauded, then it became his duty to repudiate and if he neglected to do so it was a waiver of the fraud, but if he did not know of the fraud, and was guilty of no want of diligence in discovering and repudiating it, then he would not under the Statutes of Illinois be estopped from pleading the fraud. There is certainly nothing in the statute looking to the fact, that the public in dealing with this company were giving credit to defendant, and there is just as little in the *fact* that this public gave him credit. He never took any part in the company's affairs, lived 300 miles distant from its place of business, never represented himself as a stockholder nor authorized it to be done. Certainly no body outside of Iowa and of Davis county, gave the company credit on the strength of defendant being indebted to the company. It transpires that the company officers in reporting the assetts of the company to the Auditor of Iowa, as is made their duty by Iowa Statutes to do, did not report this 80 per cent. at all, nor give any list of shareholders. See page 40, folio 101 and 102, Transcript. The fact that the Great Western officers reported this 80 per cent., to the Illinois Auditor is alluded to by Counsel. What of it? Where did they derive their power to bind him by such report? He did not authorize it. Could they bind him without his knowledge or consent? Even if he was a stockholder, this relation could

not constitute these officers his agents in making this report. On this point we invite the court's attention to the opinion of Shaw, C. J., in *Stedman vs. Eleveth*, 6 Met., 114.

***Did Defendant Repudiate before Insolvency?***

What acts were necessary to constitute "repudiation?"

It is assumed by plaintiff that nothing short of the commencement of a suit to get the name of the shareholder off the Register will constitute repudiation, in case the Company do not accept the proposed repudiation. There is a provision in the English statute authorizing a proceeding by bill, but it is not held the only method of repudiation in England.

In *McNeil's case*, L. Rep., 10 Eq., 505, Mr. McNeil did not commence any suit, nor was his name removed from the Register prior to bankruptcy. His act of repudiation consisted in saying to the "Company officers" that he would not be bound longer. He wanted, at the suggestion of the Company, that they would not sue him for his share, till after suits then pending, involving the same questions, were determined; and before he took any action further than to "repudiate" in the manner suggested, the Company failed. Yet his name was removed from the list of contributors. McNeil was registered and shares allotted May 30. He very soon afterwards *discovered* the fraud. In June he went to the "Company officers" and "repudiated." In July he did the same thing at a Company meeting. Months afterward the Company became insolvent. During all this time McNeil did nothing but wait. This the court held sufficient repudiation.

Mr. Smith (see Law Rep., 2d Ch., 603,) "repudiated" by commencing suit *just before insolvency*, but after the debts sought to be enforced against him had accrued. It could not be much consolation to creditors to know that a shareholder could not repudiate his contract procured by fraud, by *saying* "I will not be bound," while they remember that he might do so by simply *filing a bill*. There would be reason for making a distinction between these two methods of repudiation as to

debts contracted *after the act* of "repudiation." See also *Bwlch—y—Plwm Lead Mining Co. v. Paynes*, Law Rep., 2 Ex., 324, in which it was held on demurrer that a plea, setting forth that defendant having learned of certain frauds, specified in the plea, and before receiving any benefit from the Company, "*repudiated* and *disclaimed* said shares, "and gave notice of his disclaimer and repudiation" was good.

See also Chapman and Parker's cases, L. Rep., 3 Eq., 360.

In a number of English cases where relief was refused, it was put on the ground of *acquiescence after discovery* of fraud. In some cases there had been *silence*, as in Ashley's case. L. Rep., 9 Eq., 268. In others participation in Company affairs, as in Lawrence's case, L. Rep., 2 Ch. Appeals, 412; and Wilkinson's case, Law Rep., 2 Ch., 537.

In fact, we have not seen a case denying relief on the ground that the party did not file a bill, nor a case where relief was asked against fraud and denied, unless upon the ground of *negligence* or *acquiescence*.

The facts in the case at Bar are *very strong* on the point of repudiation. Soon as defendant discovered that he had been defrauded "in some respects," he tendered his stock to the Great Western Company, and demanded his note.

In June, 1871, he in person tendered his stock and demanded his note. On the very first opportunity he had of seizing his note he did so. He returned a dividend sent to him. Nothing could be more explicit as to his intentions to repudiate. It was no "playing fast and loose." All this occurred *before* insolvency and before the great fire, which plaintiff talks about so pathetically.

Plaintiff admits that a shareholder may repudiate without suit, but when? He says, "When the company acquiesces." This would no longer be repudiation, but settlement. Nothing short of acceptance by the company or *suit* will come up to the demands of plaintiff's counsel. If a shareholder should repudiate without suit, he might afterwards recant. Something must be done to prevent him from "playing fast and

loose." It seems to resolve itself into a question of good faith, and to insure good faith the shareholder must do something to prevent him from acting in bad faith, from "playing fast and loose." What shall be done? The commencement of suit will not do, because before decree rendered the party could dismiss his bill and again "play fast and loose." In view of these distressing considerations, what can be done to prevent shareholders from "playing fast and loose?" We can suggest no remedy. We presume the difficulty must be settled by saying that if a shareholder, in due time after discovering a fraud, announces to the proper parties in unmistakable terms that he will not be bound longer, tenders a recision of his contract, and subsequently squares his conduct by this disclaimer, it is enough. True, he might recant. So he might if he had filed a bill. Even if it were necessary for him to place himself in a position where he could not recant, defendant did so in a manner much more effectual than that pursued by McNeil, with respect to whom the court held he had placed himself in a position where he could not claim the benefit of membership without the consent of the company. Defendant commenced a replevin suit in the Davis County District Court and seized the note, the *only thing* given by him in connection with this transaction. He claimed in his petition that it was obtained by fraud; that it was not the property of the Great Western Company; that he had a right to its possession, putting his claim on the ground of *ownership in himself*. This claim was *sworn* to and made matter of record in a court of justice. This was the *sole consideration* for the certificate he had received. It is idle to talk about his retaining the certificate and getting the benefit of it when he had repudiated the contract by which he received it, and seized and retained on a claim of *right* and *ownership* the sole consideration given by him as his part of the contract.

It is urged with apparent candor that defendant's acts could be no repudiation, because he did not know of the fraud about the eighty per cent. when he repudiated. He had only ascertained a part of the misfortunes of his contract. We

should suppose plaintiff did not rely on this point if it were not for the labored efforts manifest all the way through the case in transcript and argument, to get it distinctly before the court, and the zeal with which it is urged.

Counsel talk quite glibly about the expression of the court in its instructions: "If you find that a few months after re-"ceiving the certificate of stock, defendant discovering that he "had been deceived, *in some respects*, sent an agent to Chi-"cago," and they declare "Judge Dillon too good a lawyer to "put such a proposition on paper." We join with counsel in bearing testimony to Judge Dillon's recognized ability as a lawyer, an ability equaled only by his industry and integrity. If "Judge Dillon is too good a lawyer to put such a "proposition on paper," he must have been influenced by some motive other than a conviction of the soundness of the "proposition." It is not our province or purpose to defend Judge Dillon. He needs none at our hands. In the great West, in the fields of his immense labors, he has attained a position so exalted as a jurist and as a man that ordinary censure or praise would not reach him.

The very foundation of plaintiff's argument on this point is based on an *unjustifiable assumption*. Counsel assume that the *only ground* on which he demanded a return of his note and tendered the stock to the Great Western Co. was the violation by the company if the promise made by its agent that the "note should not be transferred."

What right has plaintiff to make such an assumption? It is nowhere certified in the record that the *only evidence* of fraud as to the disposition of the note, was that the agent promised that it should not be transferred. On this point we certainly have the right to *assume*, and in doing so we know that we do not assume a falsehood, that the proof fully sustained our *answer*, that the note was to be given to the *Branch Company*, to be kept by it, *controlled* by it, not by the Great Western; that the branch was to be an independant company; that Long and Overton represented that this branch was so far organized as to receive notes; that Overton was *its* agent to

receive them, that defendant executed and delivered his note to Overton, as the agent of *the Branch Company* and not the Great Western, that all these statements were false, were made to deceive defendant and get possession of his note, and that they did deceive him, etc. See answer, Transcript, pages 17 to 20.

Here then is an explicit charge of fraud in *obtaining* the note. The alleged fraud does not consist in *honest promises* which afterwards were not fulfilled. They are statements of existing facts.

There was no talk about the Great Western Company transfering the note. Defendant did not propose to *deliver* the note to the company. It could make no difference if the note was payable *in terms* to the Great Western, if it *was never delivered to it.* Defendant did not want to trust his paper in the hands of strangers living 300 miles distant, but was willing to deliver his note to a company whose members and directory were his neighbors and friends. Long knew this, and finding that defendant *would not give his note to the Great Western*, got up the scheme of pretending to organize a branch as averred in answer.

It never became the property of the Great Western Insurance Company, unless *delivered* to that company or *its agent.* There is no contract till delivery. Edwards on Bills and Notes, page 186.

The *purpose* of delivery determines the character of the contract. *Idem supra*, page 187.

What constitutes delivery is a question of fact for a jury. *Dearmand vs. Dearmand*, 10 Ind., 194; *Connelly vs. Dale*, 8 Blackf., 320; *Stillwell vs. Hubbard*, 20 Wend., 45; *Jackson vs. Richards*, 6 Cowen, 618, Parsons on Notes and Bills, page 48.

*Intention* determines the character of delivery. *Clark vs. Gifford*, 10 Wend., 313; *Gilbert vs. North American Fire Ins. Co.*, 23 Wend., 45–6.

It is competent to show that possession was obtained by

fraud, and that hence there was no delivery. *Roberts vs. Jackson*, 1 Wend., 486; *Jackson vs. Myers*, 11 Wend., 437.

Suppose defendant did complain that his note was obtained by a false promise, such false promise, if made to decieve, would be a fraud. Plaintiff's counsel do not allude to the distinction between an honest promise not fulfilled and a fraudulent promise. They cite *Groves vs. Hodges*, 55 Penn., 518, and after quoting (page 43.) "But a promise is not in "itself a false and deceitful representation," forget to add this suggestion made by the learned judge who delivered the opinion: "performance *may have been intended when the promise was made.*"

*Farrar vs. Bridges*, 3 Humphrey, 566, is referred to. It like *Groves vs. Hodges*, was a simple promise, the performance of which may have been intended when made, and, of course, constitutes no fraud. It is not necessary to urge before this court that promises made purposely to deceive are fraudulent. Such promises often constitute the means of accomplishing the most criminal acts.

If A. should go to a livery man, B., and say I want to get a team to drive ten miles into the country, and will return this evening, intending thereby to get possession, sell the team and leave the country, and by such means does get possession, this is a felony in Iowa, and doubtless in every other State, and yet here is nothing but a "promise."

The judge, in his directions to the jury, did not undertake to enumerate the facts in evidence proving the deception "*in some respects.*" The language is: "*If you find from the evidence* that within a few months after receiving the stock certificates, the defendant discovered that he had been *deceived* in some respects."

This was, of course, a question for the jury, and if they did "find from the evidence" that defendant had been deceived; that he thereupon repudiated in the manner detailed by the judge, it was declared a sufficient repudiation, and why not? What was it the defendant sought to repudiate? His *contract*, the *entire contract*, not a part. It could make no difference

if the contract imposed obligations of which he was not aware. If he repudiated the contract, these unsuspected obligations would fall with it. It certainly could not in reason or law make any difference to the Company, or the public, whether he suspected the entire scope of his contract. When he did repudiate he knew he had been deceived "in some respects," and this deception was of a character so grave as to prompt him to at once repudiate the contract.

Certainly had he known at that time the full enormity of the crime pepetrated against him he would not have done less. To do more was useless. But undoubtedly the fraud by which the note was obtained, was of itself ample justification for his course. Defendant had declined to deliver any note to the Great Western Company. Then the parties seeking to obtain his note changed their plan of operations. They knew of the existence of the Iowa Southern Company, and suggested that it could be merged into a Branch of the Great Western, but still retain its independence and control of its business. These parties afterwards represented that this change was being made; that Overton was the agent of the branch and authorized to exchange Iowa Southern notes for branch notes, to be delivered to the branch, and to be kept and controlled by its directors. This, to defendant looked safe enough. He and his Davis county friends were to constitute the directory. Even assessments to cover losses were made by this branch. Relying on these statements, all of which were fraudulent, he delivered his note to Overton. Such falsehoods uttered for such a purpose, are abhorrent to the moral sense of mankind. No court could do otherwise than denounce them as a fraud.

*Wright's case*, Law Rep., 12 Eq., 331, is cited by counsel for plaintiff as an authority, and the only authority to sustain them in their position, that defendant could not repudiate his contract on account of the fraud in obtaining the note, and then claim the benefit of such repudiation in his defense of fraud as to the 80 per cent., unless he knew of that particular fraud when repudiating and put his act of repudiation on that fraud.

We confess our inability to see the force of the Vice-Chancellor's reasoning in the case cited, yet it would doubtless be an authority in point, but for one unfortunate circumstance.

Mr. Wright, not being fully satisfied with the Vice-Chancellor's decision, took an appeal, and upon full consideration by the appellate court, the Vice-Chancellor's decision was reversed. (See Law Rep., 7 Ch. Appeals, 55.) Lord Chancellor Hatherly, in delivering the judgment of the Court, says in substance that it could make no difference as to the grounds on which the company might have proceeded. If the contract was cancelled, it was as effectual as if done on the *higher right.*

### *Conclusion, Corrections, and Suggestions.*

We have now concluded what we wish to say on special points, and will close with some additional corrections, as we claim them to be, of fact, statements of plaintiff, and with some general suggestions.

It is said, on page 44, argument, that "there never was any "*unconditional* offer to surrender the stock certificate." The answer of defendant certainly makes no averment of *conditional* surrender, and even the evidence found in the bill of exceptions contains a refutation of this statement. (See Transcript, page 36, folios 87 and 88):

"Overton did go to Chicago and demand the said note and "mortgage, and offered to surrender the certificate of defend-"ant. This was in February, 1871. That the officers of the "Company stated, in reference to defendant's stock, they could "not do anything about it, * * and *they refused to receive* "*the stock certificate.*"

"Defendant, * * in June, 1871, went to Chicago, and "made same offer and demand, * * received the *same* "*answer* and *refusal.*"

It is also said in argument, page 41, that "The answer makes

"no issue of fraud as to the establishment of the Branch "Company, and no evidence was given on the point." If we understand this, it is certainly a surprising statement. We invite the Court's attention to ANSWER in Transcript, commencing page 18, folio 47*c*. A very full statement is made in the answer as to representations made by Long and Overton—that this Branch was being organized, was ready to receive notes; that it was to be an independent Company; *receive* and *control* Davis county notes; make assessments on same to cover losses; that Overton was its agent, and authorized to receive notes; that defendant could deal with it as such independent Company. And on page 20, folio 47*i* and 47*j*, the answer continues: "He" (defendant) "now charges that all these state- "ments * * were utterly false, and known to be false, and "were fraudulently made, and made to deceive defendant; that "they did deceive and mislead him * * . He says, "among the other false and fraudulent representations made "by Long * * it was represented that *said note should be* "*left with the said Branch, to be held and controlled by it,* "and that said note was never to be paid, except in case of loss "by fire, and that then it might be *assessed* by the *Branch* "*Company.* That it should not be payable on any other con- "ditions, or in any other event, and that as a *guaranty* that it "should be so treated, it was to be *left with* and *controlled by* "the Branch Company, composed of defendant and other par- "ties known to him, his friends, neighbors." So much as to the answer on this point, and the evidence was just as pertinent.

"The bill of exceptions will not show it"! This bill was not got up to show it, but only "to give an understanding of "the charge of the court, and to show the materiality of its "rulings." (See page 41, Transcript.)

The bill of exceptions does, however, say something about this matter. (See page 34, folio 81, folio 85, 86.)

Plaintiff repeatedly, in various parts of his argument, urges that there was no pretense as to a fraud in *obtaining* the note, persists in treating all this part of the case as if defendant willingly gave his note, payable in terms to the Great Western Insurance Company, delivering the same to it, and that the only complaint is that the Company transferred it contrary to a parol promise of the Company's agent. There is scarcely a page on which there cannot be found some argument based on this view, or some reference to it. If this view is not sustained by the answer of defendant and the proof, then all such argument falls to the ground. That the answer does not sustain it we have already shown. Whether the proof does or does not, the Court cannot know, as the evidence is not before it. But the entire history of the case, so far as defendant is concerned, shows that his complaint was the obtaining of the note fraudulently; not the transfer. This is the complaint he made in his petition for replevin, in September, 1871. (See Transcript, pages 37, 38 and 39.) This is the complaint distinctly made by him at all times, and why plaintiff will perisist in insisting that we only complain of a wrongful transfer, we are at a loss to know. Plaintiff even complains (page 39, argument,) that the "jury have not in the verdict" found under the charge of the court, and were not required to, find that this in "some respects was a fraud," or "that it was any part of the original contract by which he became a stockholder." The language of the charge will refute this statement. The court said: "*If you find from the evidence.*" The court does not repeat the evidence. This was not necessary. The jury are supposed to have sufficient intelligence to say "from the evidence" whether a fraud in obtaining the note had been perpetrated. As to whether the transaction of obtaining the note was a part of the contract by which he become possessed of the certificate of stock, there never was, we believe, any question with anybody, unless it might have been with counsel for plaintiff.

An argument is made based upon the "relation" of the defendant to the Company as a stockholder. The answer to this argument is plain. If he was induced to accept the certificate of stock by fraud, he never did become a stockholder, and the "relation" never was legally created. In the language of Lord Cronworth, in *Central R. R. Co., &c., vs. Kish*, Law Rep., 2 H. L., 99, "the case of defendant is that he was not a "member, for that he was induced to take shares by fraudulent "representations, which entitled him to *repudiate* and treat as "null all which he was induced to do."

Certainly he did as much toward "repudiation" as McNeil, Smith, and others referred to. Even had he commenced suit, the "*relation*" would not have ceased until a decree had been rendered, which might not be until after insolvency. We have met no case where the commencement of a suit prior to insolvency, was not held a sufficient repudiation, whether a decree was or was not rendered.

It is not true, even in England, and under the Act of 1862, that in every and any case *suit must be commenced* to be effective as repudiation. The cases cited do not so hold. Doubtless such a proceeding would be *very* proper, but it is not essential, certainly not under the Illinois statute.

The liability of defendant does not depend on "relation," but contract. See *Seymour vs. Sturgess*, 20 N. Y., 134, quoted below in this argument.

### *Diligence of Defendant in Discovering the Fraud.*

It is only necessary to say in answer to the repeated suggestion of counsel that defendant did not inform himself as to the frauds respecting the 80 per cent.--that the Company's agents so far gained his confidence as to allay all suspicions on this point when they obtained his note, and that if afterwards

nothing occurred to arouse his fears as to the 80 per cent., it is unreasonable to claim that, as matter of law, he is negligent if he fails to commence investigating.

Being once satisfied, he would remain so till something excited his fears. The subject would be dismissed from his thoughts. Other cares and enterprises would engage his mind and any rule of law requiring that he, in the absence of circumstances to excite suspicion, should go to Illinois and go to studying her laws to see whether, notwithstanding what had occurred, he might be liable, would be unreasonable; a rule not justified by experience nor adapted to human nature.

We beg pardon of the court for having trespassed on its time so much. The importance of the case is some justification. It is a test case, involving questions common to a large number of cases in Iowa. Very many men in Iowa will be ruined by a decision adverse to defendant. This, of course, is no reason why this court should not so decide, but it is a reason for the time we have devoted to it.

We regret the Great Chicago Fire and the miseries that it entailed on its population. Whether a single sufferer from that great catastrophe will be benefitted by any assets that C. W. Upton may collect as assignee of the Great Western, we do not know. To our minds it is extremely doubtful. Our belief is, and it is not unfounded, that these claims are but the out-croppings of another scheme of villainy. This is no special reason why this Court should decide this case in favor of defendant, but is perhaps a sufficient answer to the talk by learned counsel for plaintiff about the "many ruined families." If we really believed that any living person in Chicago saw the name of *J. D. Tribilcock*, of Davis county, Iowa, on some book in the Company's office in Chicago as a subscriber for $10,000 of stock, and on the faith of that name obtained a policy and sustained a loss and relied on Tribilcock to pay it, it would excite our sympathies. With our view of the case we have not expe-

rienced any such feelings, however. In fact, while we believe that Mr. Tribilcock never had the most remote idea of incurring liability in the Great Western Insurance Company, or dealing with it at all, and that he contracted and expected to pay only $2000, and supposed he could in no event be liable for more, we shall, in case he is made to pay the entire $10,000, always feel that this calamity was brought on him by a most villainous, yet a most cunning and artful scheme of fraud, one well planned to deceive much shrewder men than defendant; one, that in fact did deceive hundreds of business men of Iowa among them, occasionally a very shrewd lawyer, gentlemen of state-wide reputation. It would be a matter of profound regret if this Court should, in view of any technical rule of law, believe it to be its duty to render a decision giving encouragement by giving success to such schemes.

If it be stupid as suggested by counsel to have doubts as to the liability of defendant for $10,000, because of his possession of this certificate when he agreed only to pay $2000, then we confess our stupidity if need be; we still have doubts as to whether defendant, under the Illinois statute, is liable for more than he agreed to pay, even in the absence of fraud. It may not be that the Great Western Company could sell its stock for less than par. If it was a Railroad or other company engaged in a public enterprise in which the State was interested and which required the amount of authorized capital stock to complete it, we could see why it could not be allowed to sell its stock for less than par. We do not see why an Insurance Company, organized under the Illlinois statute could not do so. The authorized capital is only nominal. It is not expected that it will all be raised, and if the company makes no false statements to the Auditor under sections already referred to, we cannot see why the public should complain. A contract, unless restrained by statute, to sell its stock for less than par is binding on a corporation not engaged in a public enterprise. Permit

us to quote from the opinion of Justice Allen, in *Seymour vs. Sturgess*, 20 N. Y., 134, commencing on page 141; a case somewhat similar to this case This was a sale of stock at only 20 per cent. par. A creditor sued for the balance, 80 per cent. The learned Judge said:

"I yield to the authority, as well as principles and reason-
"ing of the cases, that hold that in a certain class of corpora-
"tions the franchises of which are of a public character, and
"where the capital may have been fixed with a view to the
"necessities of the corporation and to enable it to fulfill its
"duty to the public and accomplish its end, a subscription or
"agreement to take stock may imply a promise to pay for it and
"that each successive taker takes it *cum onere*. * * His
"promise is implied from the circumstances of the case, the
"public intent and the terms of the subscription. The cases
"are governed by the ordinary rules which regulate other
"transactions, and the law does not, in raising implied prom-
"ises, arbitrarily make provisions or contracts for parties, but
"spells out the intent and declares what the parties really un-
"dertook—what the contract really was. * * Without a
"promise * * a party cannot be charged. If the circum-
"stances negative all presumptions of promise, there is no rule
"of law applicable to any class of cases which compels courts
"to disregard the circumstances and adjudge a promise to have
"been made against evidence. * * The very terms of sale
"negative all reference of a promise by the purchaser to pay
"the additional sum."

Then after referring to the *Hartford & New Haven Railroad Company vs. Kennedy*, 12 Conn., 499; *Ward vs. Griswoldville Manufacturing Company*, 16 Id., 593; *Mann vs. Cook*, 20 Id., 167, and *Sayary vs. Dubois*, 3 Sandf., 466, the Judge proceeds: "The cases touching the rights and reme-
"dies of creditors is not important, unless the liability of de-
"fendant is first established." *

"*Mann v. Carrie*, 2 Barb., 294, makes the liability of stockholders to rest upon the contract—and not in 'the relation.' * * The liability is everywhere made to depend on contract. * * There was no express contract by defendant * * to take and pay for the stock" (its par value) * * * "no implied contracts made out by the evidence. On the contrary every circumstance shows that no such promise was made, or intended to be made, or understood to have been made. * * "It follows that there is no personal liability which can be enforced * * for the benefit of creditors."

See *Huddersfield Canal Co., vs. Buckley*, 7 Term. Rep., 36; *New Bedford & Bridgewater T. Co. vs. Adams*, 8 Mass., 138; *Gray vs. Coffin*, 9 Cush., 199; *Shaw vs. Boylan*, 16 Ind., 38; *Andover & Me. T. Co., vs. Gould*, 6 Mass., 40; *Barry vs. Merch. Ex. Co.*, 1 Sandf., Ch. 580; *Curtiss vs. Leavett*, 15 N. Y., 9. (see pp. 66–67); *City Bank of Columbus vs. Bruce*, 17 N. Y., 507; 36 Howard Pr. Rep., 339.

If the Great Western Company could not sell stock below par, it could not issue certificates such as defendant held, nor lawfully sell them, and if it undertook to sell them, could it or its creditors collect more that the contract price?

It is unlike the case of Hansbrough referred to. In that case shareholders had expressly agreed to pay the par value of the stock. Defendant made no such contract, and held no such certificate. Neither he nor the Company undertook to repudiate anything he had done, or had agreed to do. But the creditors now seek to compel him to do something he did not agree to.

Plaintiff claims that defendant is estopped to deny his "relation" as a stockholder, and his liability for the $10,000, because it is the custom of this country to keep a register of stockholders in the office of incorporated companies, and because the public are presumed to trust this registry. There is, as everybody knows, a principle of law, universal in its

application, that if one holds himself out to particular individuals, or to the public, in a certain character, or as sustaining certain relations, and thereby induces them to act, he shall be estopped, as between himself and such persons, to deny this character or these relations. Just to that extent we admit defendant is bound. We know of no technical rule of law so inflexible, so unjust, as to hold a party liable for the debts of a corporation on whose books his name may be found, simply because his name is there, not even if his name was put there by his consent, if that consent was obtained by fraud.

If Mr. Tribilcock had been an active member of this concern, and had held out that he was a stockholder, and owned $10,000 in stock ; or if he had knowingly or intentionally done anything to mislead the public as to his relations with the Company, he should be denied the right to repudiate this relation when sought to be made liable.

But no such facts exist in this case. We have repeatedly called the attention of the Court to the facts showing the relations of Mr. Tribilcock to this Company, showing that he never intended to deal with it at all, or to hold himself out as a member. See *Steadmon vs. Eleveth.* 6 Metc., 114.

Some importance is attached to the fact that the note and certificate show on their face that they were issued by "The Great Western Insurance Co.," as indicating that he must have known that he was dealing with that Company. But there is not much significance in this fact. The designation of the Branch was to be the Bloomfield Branch of "The Great Western Insurance Company."

It was a part of Long's scheme to obtain a note that could be used despite the will of this pretended Branch, and its future directory, and hence it was necessary to get it payable *in terms* to the Great Western Insurance Company, else it would be of no avail. To be consistent, he must also have the stock certificate in the same name, and when Tribilcock

objected, as seen by answer, (page 21, folio 47*p*,) Long said it was but a matter of convenience. In fact it was but a part of the scheme of fraud.

The mere fact that defendant's *name was on the Company's book*s could not make him liable.

The mere possession of stock does not make the holder liable, but if he voluntarily, and without fraud, has his name put on the register, he becomes liable for the amount agreed to be paid to the Company, as well as creditors. *Uphton vs. Burhan*, 3 Bissell, 431. *Helm vs. Swiggett*, 12 Ind., 194. *Mann vs. Currie*, 2 Barbour, 294. *Aderly vs. Storm*, 6 Hill, 624.

We have not been able to see *Payson vs. Withers*, cited by plaintiff. No such case reported in 4 Bissell.

We have not discussed the instructions asked by plaintiff and refused by the court:

1st. Because we are satisfied that if this Court finds that the Court below gave proper directions to the jury, it will not be disposed to reverse the case upon any hypotehtical adverse view.

2d. Because the instructions asked and refused simply present a view of the case the reverse of that given by the Court, as we think.

3d. Because we do not believe the evidence certified shows such a state of evidence as warranted the Court in submitting the case to the jury on a state of facts assumed by plaintiff in argument. The evidence was certified, not to show the materiality of instructions refused, but of instructions given. Page 41, Transcript.

4th. Because we propose to stand on the propositions contained in the instructions given, believing they embrace the entire merits of the controversy, as to the defense of fraud, and must control its ultimate determination.

There may be some technical defects in the proceeding, but we presume the Court will not reverse the case for such rea-

sons, if it determines that the Court in substance properly directed the jury as to the fraud, as to the necessity of being diligent to discover and repudiate, and as to the right to repudiate, and the time and manner of doing it.

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